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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA CASUALTY AND SURETY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "case or controversy" and "case of actual controversy" requirements of Article III of the Constitution and the federal Declaratory Judgment Act permit a federal court to adjudicate the rights and obligations of an insured and its liability insurers for defense and indemnity in all pending and future tort claims of a general type, without considering the facts presented by any particular claim.

2. Whether a federal appellate court exercising diversity jurisdiction may formulate a novel method for handling insurance coverage for asbestos litigation nationwide, without support in state law, on the ground that its new rule would in its opinion be more equitable to the parties.

3. Whether, for the purpose of determining the liability of various insurance carriers to defend and indemnify a manufacturer of asbestos products against claims for asbestos-related disease, the disease is deemed to occur:

(a) at the time that the disease first manifests itself, as held by the United States District Court for the District of Massachusetts;

(b) at the time or times the claimant inhaled the insured's asbestos products, with each insurer (and the insured, if it was not covered for a portion of the time) responsible *pro rata* for the portion of the time it was on the risk, as held by the Fifth and Sixth Circuits; or

(c) on each day between the first inhalation of the insured's asbestos products and the date (which may

be twenty years or more later) when the disease manifests itself, with each insurer on the risk during that time jointly and severally liable to the insured for the amount of the claim, as held by the court below.

4. Whether the principles set forth in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), and its progeny permit a federal court exercising its diversity jurisdiction to allocate the burden of proving the existence of insurance coverage in a manner inconsistent with established state law.

LIST OF PARTIES

The parties to this case in the court of appeals were Respondent Keene Corporation (the plaintiff in the district court), and Petitioner Aetna Casualty and Surety Company, Insurance Company of North America, Liberty Mutual Insurance Company, and Hartford Accident & Indemnity Company (defendants in the district court).

With respect to Rule 28.1 of the Rules of this Court, the parent company of Aetna Casualty and Surety is Aetna Life & Casualty, and its affiliates include: Aetna Life Insurance Company, Aetna Life Insurance and Annuity Company, Aetna Life Insurance Company of Illinois, The Excelsior Life Insurance Company of Canada, Aetna Life & Casualty, Limited, Australia, Aetna Life & Casualty (Bermuda Ltd.), Aetna Life and Casualty Company, The Aetna Casualty and Surety Company, The Standard Fire Insurance Company of Hartford, The Automobile Insurance Company of Hartford, Connecticut, Aetna Casualty & Surety Company of Illinois, Aetna Casualty & Surety Company of America, American Reinsurance Company, Aetna Casualty Company of Canada, Urban Investment and Development Co., Ponderosa Homes, Satellite Business Systems, and Geosource, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. Keene's Asbestos Litigation 4
2. The Liability Insurance Policies 5
3. Proceedings In The District Court 6
4. The Decision Of The Court Of Appeals 8

REASONS FOR GRANTING THE WRIT 10

1. The Issues Decided By The Court Of Appeals Were Abstract, Academic, And Nonjusticiable .. 12
2. The Court Of Appeals' Decision Conflicts With Other Federal Decisions On The Same Issue 17
3. The D.C. Circuit's Totally Circular Approach To The Interpretation Of Insurance Policies Is A Serious Departure From Established Principles That Threatens The Predictability Essential To Insurance 20
4. The D.C. Circuit's Placement On The Insurer Of The Burden Of Proof On Coverage Is a Square Violation Of *Erie Railroad Co.* v. *Tompkins* 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

A C and S, Inc. v. *Aetna Casualty and Surety Co.*, Civil No. 80-1341 (E.D. Pa. Oct. 6, 1980) 15

A C and S, Inc. v. *Aetna Casualty and Surety Co.*, Nos. 80-2659 and -2660 (3d Cir. Dec. 9, 1981) ... 15-16

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 (1937) 13

Allen v. *Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965) 23

Amatex Corp. v. *Aetna Casualty & Surety Co.*, No. 79-2305 (Montgomery County, Pa. Court of Common Pleas, Aug. 31, 1979) 16

American Motorists Insurance Co. v. *Squibb*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (1978) 25

Cohen v. *North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921) 25

Dick v. *New York Life Insurance Co.*, 359 U.S. 437 (1959) 28

Eagle-Picher Industries, Inc. v. *Liberty Mutual Insurance Co.*, Civ. No. 78-2739-Z (D. Mass. Aug. 14, 1981), *appeals docketed*, Nos. 81-1761 to -1763 (1st Cir.) 16, 17

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938)... ii, 28

Forty-Eight Insulations, Inc. v. *Johns-Manville Products Corp.*, 472 F.Supp. 385 (N.D. Ill. 1979) 15

GAF Corp. v. *INA*, No. C-1251-78E (N.J. Superior Court, Mercer County) 16

Golden v. *Zwickler*, 394 U.S. 103 (1969) 12

In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F.Supp. 906 (J.P.M.D.L. 1977) 4

Insurance Co. of North America v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 50 U.S.L.W. 3466 (December 7, 1981) (Nos. 81-198 and 199), *petition for rehearing pending* 7, 16, 17

Table of Authorities Continued

Page

Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) 13, 16

Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (December 7, 1981) (No. 81-200), *petition for rehearing pending* 7, 16, 17

Reiser v. *Metropolitan Life Insurance Co.*, 262 App. Div. 171, 28 N.Y.S.2d 283 (1941), *aff'd*, 289 N.Y. 551, 43 N.E.2d 534 (1942) 25, 26

Silverstein v. *Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930) 25

Steven v. *Fidelity & Casualty Co.*, 58 Cal.2d 862, 377 P.2d 284, 27 Cal Rptr. 172 (1962) 23

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947). 12

Urie v. *Thompson*, 337 U.S. 163 (1949) 24

STATUTES AND CONSTITUTIONAL PROVISIONS:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1652 3
28 U.S.C. § 2201 ..... 3, 12

U.S. Constitution
Art. III, Section 2 2

MISCELLANEOUS:

Annotation, *Health Policy—Exclusion of Prior Illness*, 94 A.L.R. 3d 990 (1979) 25

Best's Insurance Management Reports: Property/Casualty No. 7 (June 9, 1980) 18

Califano, J., *Environmental Pathology and Toxicology*, 1:727-29 (1978) 18

10 *Couch on Insurance* 2d, § 41:814 25

Keeton, *Insurance Law Rights At Variance With Policy Provisions*, 83 Harv. L. Rev. 961 (1970).. 23-24

N.Y. Times, July 3, 1981, § 1, at 1, col. 1 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Aetna Casualty and Surety Company respectfully prays that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the District of Columbia Circuit on October 1, 1981.[1]

[1]Petitions have recently been filed by other parties seeking review of the same judgment of the court of appeals, as follows: *Insurance Company of North America* v. *Keene Corp.*, No. 81-1012; *Hartford Accident & Indemnity Co.* v. *Keene Corp.*, No. 81-1197. Petitioner is advised that Liberty Mutual Insurance Co. will also file a petition within the next few days.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit as modified by its order of December 21, 1981 (Pet. App. A, pp. 1a-43a, *infra*) is not yet officially reported. The opinion of the United States District Court for the District of Columbia (Pet. App. B, pp. 45a-53a, *infra*) is reported at 513 F.Supp. 47.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 55a, *infra*) was entered on October 1, 1981. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied by orders dated November 19, 1981 (Pet. App. C, pp. 56a-59a, *infra*). This Court's jurisdiction to review the judgment below is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1652 of Title 28, United States Code, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Section 2201 of Title 28, United States Code, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

The decision of the court of appeals purports to declare the obligations owed to a manufacturer of products containing asbestos by its successive liability insurers in thousands of unspecified past and pending suits—and an unknown number yet to come. The one common element in those suits against Keene is a claim that exposure to Keene's products caused the claimant to contract some form of asbestos-related disease. The court below held that each insurer whose policy was in force from the time a particular claimant first inhaled dust from Keene's products through

the time his asbestos-related disease manifested itself is jointly and severally liable to provide a defense for Keene and to indemnify it in full for judgments or settlements. In reaching this decision, the District of Columbia Circuit reversed the district court's determination and explicitly rejected the holdings of every other court that has considered the same question with regard to other asbestos manufacturers.

1. Keene's Asbestos Litigation

From 1948 through 1972, Keene and certain of its corporate predecessors manufactured various insulation products which contained asbestos.[2] Like many other firms in this and other lines of business involving asbestos, Keene has been and expects to be a defendant in a very large number of lawsuits in which one or more claimants allege that they have contracted some form of asbestos-related disease as a result of being exposed to asbestos dust from Keene's products.

The record does not reflect the precise nature of the suits pending against Keene, but such suits can vary widely. *See In re Asbestos and Asbestos Insulation Material Products Liability Litigation,* 431 F.Supp. 906 (J.P.M.D.L. 1977). The potential plaintiffs can be anyone who has been exposed to asbestos—for example, workers at the plants where asbestos products were manufactured, workers who installed or worked with such products, and even family members who allege exposure to dust brought home in clothing. The exposure may have occurred entirely during a period

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[2] Throughout this Petition, unless otherwise noted, Keene and its affiliates will be referred to collectively as "Keene."

twenty or more years ago, when Keene was not insured, or at different times over the years, or during a continuous period up to the diagnosis of the disease. Alleged liability may be based on principles of strict liability, negligence, or breach of warranty, all of which are defined and limited in accordance with whatever state's law is applicable. The claimant's disease may be asbestosis, a fibrous condition of the lungs, or various types of cancer. Typically, these diseases do not appear until many years after a plaintiff seeking damages was first exposed to asbestos.

2. The Liability Insurance Policies

From 1961 to the present, Keene has been insured under a succession of general liability policies issued by four insurance companies: Petitioner Aetna, Insurance Company of North America (INA), Liberty Mutual Insurance Company (Liberty), and Hartford Accident and Indemnity Company (Hartford).[3] The terms of Aetna's policy are typical (*see* pp. 35a-39a, *infra*):

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[3] The policy periods for each were: INA (December 31, 1961, through August 23, 1968), Liberty (August 23, 1967, through August 23, 1968, and October 1, 1974, through the date of the decision below), Aetna (August 23, 1968, through August 23, 1971), and Hartford (August 23, 1971, through October 1, 1974). INA and Hartford are the petitioners in Nos. 81-1012 and 81-1197, respectively.

Keene's contention that it was insured by Pennsylvania Manufacturer's Association Insurance Co., also a party in the district court, from November 1, 1948, through November 1, 1959, was the subject of a separate appeal. Liberty and Keene are also disputing the question whether Liberty's 1967-68 policy covers Keene's liability for the products of its subsidiaries. *See* pp. 33a-34a, *infra*.

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> bodily injury or
>
> property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent . . .

The policy defines "bodily injury" as "bodily injury, sickness or disease" and an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury."

In the context of asbestos-related disease, these provisions make coverage available if, but only if, the alleged exposure to asbestos from Keene's products, an "injurious exposure to conditions" for purposes of the policy, *"results, during the policy period"* in asbestos-related "disease" or "bodily injury." Coverage is thus dependent on when an asbestos-related injury or disease is deemed to "result" from exposure to that substance.

3. Proceedings In The District Court

Keene initiated this action to obtain a declaratory judgment determining the coverage of its policies for asbestos-related claims, and damages. Jurisdiction was based on diversity of citizenship. Keene's original and two amended complaints advanced an "exposure" theory of coverage, alleging that asbestos-related "injury" occurred when a claimant was exposed to—*i.e.*,

inhaled or ingested—asbestos fibers from Keene's products and that the insurers on the risk during this period or periods were obligated to defend and indemnify Keene.

Aetna, Liberty, and INA advocated the so-called "manifestation" interpretation of the policies. Under this interpretation, "disease" or "injury" is said to occur or result when its symptoms appear for the first time or when it can be diagnosed. Hartford advanced a version of the "exposure" interpretation that had been adopted by the Fifth and Sixth Circuits.[4] Under that theory, all insurers on the risk when the claimant was exposed to asbestos (and Keene, to the extent it was uninsured during that period) would divide responsibility for the costs of defense and any ultimate liability on a *pro rata* basis.

After discovery, Aetna moved for summary judgment on the ground that the suit was not a justiciable "case or controversy," since Keene was seeking only an advisory opinion which would be generally applied to various suits in which Keene was or might be a party, rather than a judgment on the facts of any particular suit against Keene. Hartford and Keene sought partial summary judgment on their respective theories of coverage. In its memorandum decision of January 30, 1981 (Pet. App. B, pp. 45a-53a, *infra*), the district court denied Aetna's motion and approved

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[4] *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 50 U.S.L.W. 3466 (December 7, 1981) (Nos. 81-198 and -199), *petition for rehearing pending; Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (December 7, 1981) (No. 81-200), *petition for rehearing pending.*

Hartford's theory concerning the proper interpretation of the policies.

The district court certified its order for interlocutory review under 28 U.S.C. § 1292(b), and all parties except Hartford took appeals.

4. The Decision Of The Court Of Appeals

The court of appeals held at the outset that Keene's broad declaratory judgment action was a justiciable "case or controversy." It stated that "Keene has been, and will continue to be, sued" by claimants alleging injury from asbestos, and ruled that "[f]or each of these suits—past, present, and future—the rights and obligations of Keene and its insurers must be resolved," whether or not "each of these suits" presented any coverage dispute. *See* p. 7a, *infra*. Declaring itself unaware "of any facts that would come to light in a particular tort suit that would be relevant to the determination of the policies' applicability to Keene's liability for asbestos-related injury," the court held that it could adjudicate the parties' rights and obligations in each of Keene's suits on the basis of "the terms of the insurance policies and the facts of the particular diseases whose coverage is at issue." *Id.*

The court's decision on the merits contained three broad conclusions regarding the policies' coverage:

a. "[I]nhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies." *Id.* at 22a.

b. "[T]he policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability,"

subject only to policy limits and "other insurance" provisions. *Id.* at 24a.

c. "Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs." *Id.* at 30a.[5]

These holdings, as well as every intermediate step in the court's analysis, followed directly from its initial premise that when Keene purchased its policies it "could have reasonably expected that it was covered for all liability, except liability for injuries of which Keene could have been aware prior to its purchase of insurance." *Id.* at 16a-17a; *see id.* at 20a, 24a-26a, 28a. The court's opinion made it clear that these "reasonable expectations" were a hypothetical construct—"the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language." *Id.* at 11a n.12.[6] The court conformed the policy language to the result it derived from these imputed "expectations" by "construi[ing] 'bodily injury' to mean any part of the single injurious process that asbestos-related diseases entails." *Id.* at 22a.

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[5] Judge Wald disagreed with the second and third of these holdings, stating that it would be "logical and fair" to allocate the costs of defense and liability *pro rata* in accordance with *Forty-Eight* and the lower court's decision. *Id.* at 40a-43a.

[6] After the court's opinion was initially issued, petitions for rehearing were filed pointing out that the "reasonable expectations" imputed to Keene were in fact directly contrary to the legal position its executives and counsel had advocated in the district court. Thereafter, the court of appeals modified the cited portion of its opinion to make it clear that its understanding of Keene's "reasonable expectations" was not based on any record facts.

The court's opinion concluded with a discussion of the procedures under which factual issues regarding the periods during which a claimant had been exposed to a particular firm's asbestos products would be resolved. It placed the burden of disproving that a claimant was exposed to a particular company's products on the company in the tort suit and on the insurer in any suit between insured and insurer, reversing the traditional plaintiff's burden in each instance. *Id.* at 32a-33a.

REASONS FOR GRANTING THE WRIT

Although the questions presented on the merits below are governed by State law, and consequently are not the sort that usually warrant review by this Court on a writ of certiorari, this case provides unique and compelling circumstances that necessitate the exercise of the Court's jurisdiction.

First, neither the court below nor any other federal court that has addressed the same issues purported to rest its decision on the law of any particular state. Indeed, to the extent the court of appeals referred to state law at all, it was to assume that there was no difference among the states in the applicable principles. And when faced with a uniform state rule on burden of proof contrary to the principle it wished to establish, the court of appeals dismissed that rule with the airy conclusion that its own novel principle would be "more equitable for all parties." *See* p. 33a n.42, *infra.*

Second, this is not a case where the principle of state law adopted by the court of appeals controls only a single case. Ordinarily, this Court is justifiably re-

luctant to consider and determine an issue as to which the federal courts do not have the last word, for the highest State court can in the very next case reject this Court's holding and adopt its own interpretation of state law. The court of appeals' declaratory judgment in this case, however, will not just affect a single lawsuit, but will directly control the rights and obligations of an asbestos manufacturer and its insurers in thousands of pending cases and perhaps tens of thousands of future cases nationwide.

Third, the conflict among the Circuits on the central issue decided by the court of appeals is incontestable and results in diametrically opposite rules of insurance coverage being applied not just in different lawsuits, but as to different parties in the same lawsuit, depending upon the fortuitous choice of Circuits within which each party has litigated or may litigate its declaratory judgment action. In any multi-defendant asbestos-related lawsuit, one defendant, which was uninsured during a part of the exposure period, may be liable with one or more of its insurers on a *pro rata* basis for defense costs and indemnity; Keene, although similarly uninsured for a portion of the exposure period, will have its liability fully covered under the scheme adopted by the court below; and a third defendant may have its insurance coverage determined solely by the policy in effect on the date of manifestation of the disease. Furthermore, depending on the jurisdiction where the obligations of Keene's excess liability insurers (who were not parties in the court below) are determined, different rules may apply even as to Keene itself for primary and excess coverage. In short, the conflict among the Circuits creates immediate and chaotic results in thousands of cases.

Finally, the question of justiciability in the context of this pathbreaking use of the Declaratory Judgment Act, 28 U.S.C. § 2201, is plainly one of federal law as to which, for the reasons described below, this Court's review at this time is warranted.

1. The Issues Decided By The Court Of Appeals Were Abstract, Academic, And Nonjusticiable

When the court of appeals determined to resolve in this case "the rights and obligations of Keene and its insurers" in all suits—"past, present and future"—for "injuries that result from the use of its asbestos products" (p. 7a, *infra*), it dramatically departed from the limitations traditionally placed by federal courts on the use of declaratory judgment actions. That is so because the court was not asked to and did not make its rulings on the basis of facts presented in any actual case. Rather, Keene sought and the court granted declarations of rights and obligations under the various insurance policies in all existing and future lawsuits based on nothing but the language of the policies and its understanding of the diseases involved in the abstract.[7] This procedure violates the basic requirement for a justiciable case or controversy: " 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969) (*quoting United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947)). By upholding jurisdiction in such a case, the court of

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[7] As we discuss, *infra*, pp. 14-15, the court of appeals largely ignored even the medical evidence, preferring to rest its rulings on what it believed Keene, if it had given any thought to the matter when the policies were issued, "could reasonably have expected" its coverage to be.

appeals has greatly expanded the use of the Declaratory Judgment Act in insurance disputes and has made sweeping determinations of tremendous importance to the insurance industry without an adequate factual basis, and without the necessity of dealing with difficult factual issues that would be presented in particular cases to which its rulings will nevertheless apply.

The declaratory judgment has been a traditional and useful method for resolving disputes regarding insurance coverage independently of the underlying tort litigation. However, courts have customarily been willing to resolve those disputes only in the context of a particular claim, the facts of which both require and illuminate the determination sought. Thus, in *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240-42 (1937), the question was whether certain life insurance policies were void for nonpayment of premiums by the named insureds. Because the suit involved a specific dispute calling for "adjudication of present right upon established facts," the Court held a justiciable claim was presented and a suit for a declaratory judgment by the insurer was proper. Similarly, in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270 (1941), the declaratory judgment action sought a determination whether a specific truck driven by a specific person at a given time was one "hired by the insured" under the terms of the liability policy, a concrete dispute capable of determination on a full factual record.

In the district court, Keene put in the record at various times copies of complaints that had been filed against it in certain cases, letters from certain insurers declining representation or agreeing to representation

with reservation of rights in other cases, and three transcripts in still other cases.[8] It declined, however, to put the entire facts of any particular claim before the court for decision. Rather, as Keene stated in its Reply Brief in the court of appeals (at p. 25):

> The determination sought by Keene of the defendants' obligations rests upon a construction of the standard comprehensive liability insurance policy language and not upon the facts of any individual case.

Keene, like the court of appeals, ignored the fact that the applicability of the "policy language" in any case can be determined *only* on the basis of the facts of that case—namely, whether an "occurrence" had "resulted" in "bodily injury" (including disease) "during the policy period."

The court of appeals felt that despite the absence of concrete facts as to any particular claim, the case was nevertheless justiciable because it knew of no facts "that would come to light in a particular tort suit that would be relevant to the determination of the policies' applicability to Keene's liability for asbestos-related injury." *See* pp. 7a-8a, *infra*. That view was not surprising in light of the court's conclusion that

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[8] The Court of Appeals stated in its opinion that "Keene tendered the asbestos-related damage cases to its insurance companies for defense and indemnification. Each company, however, either denied all responsibility for the suits or accepted only partial responsibility." *See* p. 5a, *infra*. That statement was contrary to the record. In fact, no company denied responsibility for all suits. Each made individual determinations based on the allegations of each complaint, and an insurer—usually Liberty Mutual—agreed to defend and was defending all suits identified by Keene.

the "only relevant facts" were "that the diseases develop long after exposure to Keene's products, and that Keene can be held liable for their occurrence." *Id.* at 4a n.3. The court was plainly wrong in this view. The district judge in *Forty-Eight Insulations, Inc.* v. *Johns-Manville Products Corp.*, 472 F. Supp. 385, 395 (N.D. Ill. 1979), was closer to the mark when he recognized that in asbestos-related personal injury cases,

> [p]roof of causation would require evidence regarding the length and type of exposure to asbestos, the physical characteristics of the injured person, and technical medical evidence. All of these issues would be completely unique to each personal injury plaintiff.

The court in that case went on to determine that the plaintiff's action for a declaratory judgment of indemnity against its asbestos suppliers was not justiciable (*id.*):

> We cannot issue a declaratory judgment as to plaintiff's right to indemnity in abstract terms. Any declaratory judgment as to the liability of any defendant would have to make reference to specific cases, because only specific cases with concrete sets of facts will lend the requisite controversy to the declaratory relief.

Other courts that have considered insurance coverage disputes in declaratory judgment actions similar to this case have reached conflicting results on the issue of justiciability. In *A C and S, Inc.* v. *Aetna Casualty & Surety Co.*, Civil No. 80-1341 (E.D. Pa. Oct. 6, 1980), the district judge found the action nonjusticiable. Following the D.C. Circuit's decision in the present case, however, the Third Circuit reversed. *A C and S, Inc.* v. *Aetna Casualty & Surety Co.*, Nos. 80-2659 and

-2660 (3d Cir. Dec. 9, 1981). At least two state courts have found similar declaratory judgment suits non-justiciable.[9] In *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra,* and *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.,* No. CA 78-2739-Z (D. Mass. Aug. 14, 1981), *appeals docketed,* Nos. 81-1761 to -1769 (1st Cir.), in which Aetna was not a party, the issue of justiciability was not raised. In *Porter* v. *American Optical Corp., supra,* no question of justiciability was presented because the court did have before it precisely the circumstances necessary properly to determine an insurance coverage issue: an actual plaintiff whose injury, and the causes thereof, were determinable (indeed, had been determined by trial) and a concrete dispute between the insured and its carriers as to who was responsible for the judgment.

We recognize, as this Court stated in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co., supra,* 312 U.S. at 273, that "it would be difficult, if it would be possible, to fashion a precise test for determining in every case" whether a justiciable controversy exists. However, the questions decided by the court of appeals are certainly the most important and consequential to the insurance industry in recent memory, and are not issues that should be decided for all time to come in the academic, abstract setting presented by Keene in this case. Moreover, by loosing the declaratory judgment action in insurance coverage disputes from its traditional foothold in the concrete facts of particular

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[9] *Amatex Corp.* v. *Aetna Casualty & Surety Co.*, No. 79-2305 (Montgomery County, Pa. Court of Common Pleas, Aug. 31, 1979); *GAF Corp.* v. *INA*, No. C-1251-78E (N.J. Superior Court, Mercer County).

cases, the decision of the court of appeals will greatly enlarge the availability of that remedy. Both insurance companies and their insureds can now select a favorable federal forum [10] and secure determinations, binding nationwide, as to their respective obligations under insurance policies in products liability cases. Such decisions will be informed by hypotheticals, not by the experience with actual cases that has been the genius of common law.

2. The Court Of Appeals' Decision Conflicts With Other Federal Decisions On The Same Issue

The D.C. Circuit's decision in *Keene* conflicts squarely with decisions of the Fifth and Sixth Circuits, *Porter* v. *American Optical Corp., supra; Insurance Co. of North America* v. *Forty-Eight Insulations, Inc., supra,* and the federal district court in Massachusetts, *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co., supra.* In all four cases, the courts considered substantially identical insurance agreements and concluded that the law of all interested states was uniform. Nevertheless, *Forty-Eight* and *Porter* concluded that those insurers on the risk during the period of the claimant's exposure to the insured's products are liable for *pro rata* shares of the costs of defense and indemnity, *Eagle-Picher* holds the insurer on the risk at the time of manifestation solely responsible, and *Keene* makes all insurers, from the point of first ex-

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[10] At the time Keene filed its complaint in the United States District Court for the District of Columbia, not a single asbestos case had been filed aginst Keene in that jurisdiction. Subsequent to the filing of the complaint only six such cases have been filed in the District out of more than 6,000 nationwide.

posure through manifestation, jointly and severally liable.

The importance of this issue, on which the lower courts have reached widely divergent and mutually irreconcilable conclusions, merits review by this Court. As of July 1981, some 12,000 suits seeking damages on account of asbestos-related diseases were pending, and the number of such suits was growing at some 400 per month.[11] Even these figures may well understate the potential magnitude of asbestos litigation in the future. Eight to eleven million workers have been exposed to asbestos since World War II, and some 20,000 asbestos-related deaths may occur each year until the year 2000.[12]

The effect of a sweeping declaratory judgment not tied to a particular tort claim, such as the judgment of the court below, is to control insurance coverage questions among the parties in all future cases, rather than allowing them to be resolved on the basis of the facts presented in each case in light of principles established in previous decisions. The only policy that can be advanced in support of such a method of resolving insurance coverage questions is that it can provide certainty and uniformity that will foster efficient management of a crush of litigation. However, because of the nature of asbestos-related litigation—involving multiple defendants and claims of exposure that cover time periods when many defendants had several different primary insurance carriers and still

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[11] *N.Y. Times*, July 3, 1981, § 1, at 1, col. 1.

[12] Califano, *Environmental Pathology and Toxicology*, 1:727-29 (1978); Best's Insurance Management Reports: Property/Casualty No. 7 (June 9, 1980).

other excess liability carriers—that policy of uniformity and certainty requires an agreement among the courts on the central issues of coverage that, in light of the conflicting rulings of the lower federal courts, only this Court can now achieve.

It is by no means uncommon for eight to ten firms to be defendants in a single asbestos-related suit. To the extent that these firms and their carriers have been parties to any of the decided declaratory judgment cases, their respective rights and obligations will have been formally determined in any of three conflicting ways. For example, if Keene were a party to the suit, Aetna and the other parties below would be potentially responsible for Keene's defense and total liability. However, insurers bound by other decisions would have totally different responsibilities vis-a-vis other insureds.[13] Alongside this hodge-podge of litigated relationships would be an area of complete uncertainty. Rights and obligations that had not been actually litigated would be totally unpredictable, since their ultimate resolution would be dependent on the fortuity of the jurisdiction in which they might happen to be resolved in the future. In such a setting, sure to occur many thousands of times in the near future, it is difficult to imagine that any consensus could emerge regarding a fair basis for allocating the costs of litigation and any resulting judgment or settlement absent a ruling by this Court.

The existing conflict in the decisions may also result in a spate of forum-shopping and races to judgment in state and federal courts. Firms with exposure for asbestos-related disease have every reason to follow

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[13] Liberty Mutual has been a party, for instance, in *Forty-Eight, Keene* and *Eagle-Picher*.

Keene to the District of Columbia, particularly since the D.C. Circuit has declared itself willing to litigate an insurer's duties and obligations without regard to any particular claimant. Insurers will have a similar incentive to seek their own favorable forum. This Court's review is appropriate to preclude the disputes among courts and procedural sparring that are sure to follow.

3. The D.C. Circuit's Totally Circular Approach To The Interpretation Of Insurance Policies Is A Serious Departure From Established Principles That Threatens The Predictability Essential To Insurance

The D.C. Circuit's decision in *Keene* also warrants review quite apart from its inconsistency with other decisions on the same issue. The court of appeals' explicitly circular reliance on the "reasonable expectations" it imputed to Keene is a serious departure from established principles of law. The immediate effect of this judicial fiat is to shift potentially enormous liability in thousands of cases to Aetna and its co-defendants. Moreover, the lower court's approach, which puts insurers and their insureds at the mercy of every court's idiosyncratic understanding of what hypothetical expectations of an insured would have been reasonable, cannot be limited to asbestos litigation and thus seriously threatens the certainty that is essential to the provision of insurance at a reasonable price.

Over and over again in its opinion, the court of appeals attributed its interpretation of Keene's insurance policies to the company's supposed "reasonable expectation" that "it was covered for all future liability, except for liability for injuries of which Keene could have been aware prior to its purchase of insurance." *Id.* at 11a & n.12, 16a-17a, 20a, 24a. Though

cloaked in the language of Keene's state of mind, this "reasonable expectation" was purely the lower court's creation. The court made clear that its decision did not "rely on any legal or factual aspect of Keene's argument" (*id.* at 22a n.25) and that the expectations to which it was referring were "the expectations that Keene *could have* reasonably formed, as objective matter, on the basis of the policies' language" (*id.* at 11a n.12 (emphasis added)).[14] In making the interpretation of Keene's policies dependent on this purely hypothetical construct, the D.C. Circuit adopted its ultimate conclusion as its initial premise.[15]

There was not a shred of factual support for the proposition that Keene expected, reasonably or otherwise, that each of its policies would cover all of its

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[14] Paradoxically, even though it identified the policy language as the source of Keene's "reasonable expectations" with respect to asbestos-related disease, the court complained that "the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases" (p. 9a, *infra*). It also downplayed in quick succession the medical understanding of the term "injury," that term's "ordinary definition" and its "legal definition . . . in other contexts." *Id.* at 13a-14a. Instead, it chose to consider the policy language "only as an incidental aspect of a logically prior determination of Keene's rights under the policies viewed in their entirety." *Id.* at 25a. Such analysis reverses the traditional process of contract interpretation. It makes the policy language fit the court's result, instead of the opposite.

[15] Judge Bazelon's opinion also claimed reliance on "the policies' dominant purpose of indemnity," their "function of relieving Keene of all risk of liability," an understanding of the policies as "an exchange of an uncertain loss for a certain loss" or "a purchase of certainty," and "principles embodied in the policies" which it "discern[ed]" on the basis of Keene's "reasonable expectations." *E.g.*, *id.* at 10a-11a. However, not one of this bewilder-

liability. In fact, Keene's own pleadings and the testimony of its executives established that it had no expectation that its policies would be triggered by any one of three events occurring during a policy period—exposure, manifestation and "exposure in residence." An early motion by Keene for partial summary judgment summarized the exposure theory that it espoused for the first two years of pretrial proceedings:

> Keene submits that each defendant . . . is jointly and severally obligated to provide Keene with a defense in every case which alleges or otherwise shows during the policy period of any such carrier *an exposure to insulation products* containing asbestos fibers supplied by Keene or a predecessor of Keene (emphasis added).[16]

The testimony of Keene's executives was to the same effect. For instance, Keene's treasurer testified, "I think if the exposure period was outside the year of coverage by a carrier, the carrier would not have the liability." Indeed, the court of appeals noted that Keene did not raise its "exposure in residence" theory in the district court. *See* p. 22a n.25, *infra*. And surely it defies reason to suggest that a company which purchased one day of insurance for a negligible premium in 1972 "could reasonably expect" that all of its liability to any worker exposed to its products at any

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ing array of interpretive devices provides the slightest insight into the proper interpretation of the policies. Indeed, most are transparently circular. Understanding a policy as having a "dominant purpose of indemnity" or constituting "a promise of certainty" does not guide a court to a determination of what risks are to be indemnified or eliminated with certainty.

[16] Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment, p. 2 (1978).

prior time would be covered, as long as the disease had not yet manifested itself, although this is what the court of appeals' holding would require. In short, *Keene's* reasoning leaves courts free to interpret insurance policies on the basis of imputed "reasonable expectations" that are directly contrary to the facts, the parties' explicit legal positions and common sense. Such "reasoning" makes a mockery of contract interpretation.

The majority's "leap of logic" (*id.* at 40a (Wald, J., concurring)) is a substantial departure from established authority. Courts that have referred to the "reasonable expectations" of insureds have done so with careful attention to the actual facts of the case and usually in the context of deviating from policy language where necessary to protect relatively unsophisticated purchasers of insurance against unforseeable consequences of policy exclusions and misleading practices.[17] Professor (now Judge) Keeton, on whose law review article Judge Bazelon relied heavily (*id.* at 11a n.12), extrapolated from such cases to the general principle that (Keeton, *Insurance Law Rights*

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[17] The cases cited by the court of appeals are typical. In *Steven* v. *Fidelity & Casualty Co.*, 58 Cal.2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962), the court refused to enforce several exclusions in a life insurance policy purchased at an airport vending machine, noting that the exclusions were ambiguous, were not visible to a purchaser until after the premium had been inserted into the machine, and could not have been understood by or explained to the insured at the time of purchase in any event. *Allen* v. *Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965), was a case in which an insurance agent told the insured that he would be covered immediately if he paid his premium for life insurance in advance. When the insured died before the policy was formally approved by the insurer, the company refused approval and, invoking language in the binder, attempted to disclaim coverage.

At Variance With Policy Provisions, 83 Harv.L.Rev. 961, 967 (1970)):

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

However, the very next sentence in Professor Keeton's article expressly cautioned against employing this principle as the D.C. Circuit did, describing it as "too general *to serve as a guide from which particularized decisions can be derived through an exercise in logic,* and too broad to be universally true." *Id.* at 967 (emphasis added). The court below thus transformed what had previously been a discriminating, fact-based form of analysis employed in unusual cases of particular unfairness into what its leading proponent said it should not be: "a guide from which particularized decisions can be derived through an exercise in logic."

The decision of the court below also departed from a body of case law holding that when the cause of an injury or disease precedes its appearance, the time that it "manifests" itself is the date that it is deemed to occur. For example, the court blithely dismissed this Court's decision in *Urie* v. *Thompson,* 337 U.S. 163 (1949) as "not at all relevant" and as having "no bearing." However, *Urie,* which held that a cause of action based on silicosis (a disease identical in all relevant aspects to asbestosis) "accrued" for purposes of a statute of limitations at the time it manifested itself, points to the correct result in this case. Because a liability insurer's duty to defend and indemnify its insured can arise only after a claimant's cause of action against the insured accrues, it makes perfect

sense to fix the time that bodily injury or disease "results," for purposes of liability insurance, at the time it develops to the point where it can be the basis of a legal claim.

The lower court's treatment of many decisions, directly on point, which hold that disease "occurs" for purposes of health insurance policies when it appears, was equally disingenuous. *See, e.g., Reiser* v. *Metropolitan Life Insurance Co.*, 262 App.Div. 171, 28 N.Y.S. 2d 283 (1941), *aff'd*, 289 N.Y. 551, 43 N.E.2d 534 (1942); *American Motorists Insurance Co.* v. *Squibb*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978); 10 *Couch on Insurance* 2d, § 41:814; Annotation, *Health Policy—Exclusion of Prior Illness*, 94 A.L.R. 3d 990, 998 (1978).[18] Even though the court relied on two of these cases[19] in concluding that "manifestation" should trigger coverage under Keene's policies, it suggested that their reasoning was inapplicable where the same interpretation would operate to deny coverage. *See* p. 15a n.17, *infra*. In fact, however, these cases are not a one-way street. They held that diseases occur when their symptoms appear or they can be diagnosed because this interpretation conforms to the natural understanding of such policy language. In the context of

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[18] The court cryptically suggested that accident insurance cases were somewhat off the point because "the only problem in those cases . . . is to determine when a disease begins in order to decide whether it began during a policy period." *See* p. 15a n.17, *infra*. That is, however, precisely the issue under the policies involved in this case, which provide coverage only for disease or bodily injury which "results, during the policy period."

[19] *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930); *Cohen* v. *North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921).

health insurance, which pays a sick individual's medical expenses or liability insurance, which provides indemnity for compensable legal claims, it is incongruous to say that a person is "diseased" or "injured" at a point where the individual's disease cannot be diagnosed, no treatment is or may ever be necessary, and no legal claim has accrued.[20]

The D.C. Circuit's displacement of traditional principles of interpretation and controlling authorities with a principle of "reasonable expectations" that provides no meaningful check on courts is worthy of this Court's review. In addition to its immediate effect in many thousands of asbestos cases, *Keene* will have a serious unsettling effect in insurance law generally. The majority was careful to avoid limiting its decision to asbestos-related disease, and Judge Wald noted that it could be "a precedent for other product-exposure injuries, as of yet unknown in origin." *See* pp. 4a n.3, 41a, *infra*.

The indispensable predicate of any kind of insurance is the insurer's ability to calculate with a reasonable degree of certainty the risks that it is assuming when it writes a policy. Only on that basis can it calculate a premium that will cover the liability that it will certainly incur to some of its policyholders. *Keene* destroys that necessary certainty because it makes the insurer's liability totally dependent on every judge's

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[20] This interpretation conforms with the layman's understanding of "disease" or "injury" as well. Although virtually everyone in an urban environment has been exposed to some asbestos, few would consider each such person "diseased" or "injured" for purposes of insurance. *E.g., Reiser* v. *Metropolitan Life Ins. Co., supra.*

unrestrained and retrospective assessment of what an insured "*could* reasonably have expected." The decision of the court below is unquestionably a bonanza for Keene. However, its disregard of the insurers' "reasonable expectations" under their policies will not serve the long-term interests of those who will need to purchase insurance in the future or look to insurance for compensation for an injury.

4. The D.C. Circuit's Placement On The Insurer Of The Burden Of Proof On Coverage Is A Square Violation Of *Erie Railroad Co.* v. *Tompkins*

The D.C. Circuit recognized that making exposure to Keene's products and "exposure in residence" triggers of its insurers' liability would create serious administrative difficulties and disputes among insurers and their insureds as to when a particular claimant was first exposed to Keene products.[21] Its response was to create a presumption that any claimant was exposed to Keene's products throughout the period of his or her exposure to asbestos. The court made this presumption applicable between Keene and claimants (even though no claimant was a party to or the specific subject of the suit) and between Keene and its insurers (p. 33a, *infra*). The effect of this decision was to place the burden on the insurer to disprove a fact on which coverage depends.

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[21] The existence of such problems is a powerful reason for adopting the "manifestation" interpretation of the policy language. Under that approach, coverage depends on an event, the appearance of symptoms or a diagnosis, that will have occurred in the relatively recent past, and one primary carrier will ordinarily be solely responsible for the insured's defense and indemnity.

The court conceded that "the insured generally bears the burden of proving coverage," but nonetheless chose to reach a different result. In so doing, it violated the principles of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). Federal courts exercising their diversity jurisdiction are required to follow state law in allocating the burden of proof, *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 446-47 (1959), even if they believe the applicable state's rule would "defeat Keene's or its insurers' substantive rights under the policies" or that a shift of the burden "will be more equitable for all parties and will prevent unnecessary litigation." *See* p. 33a n.42, *infra*. The D.C. Circuit's cavalier disregard of this fundamental principle of federalism is an additional ground for review.[22]

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[22] The court modified its original opinion after petitions for rehearing had pressed this point, stating:

> We recognize that burdens of proof are matters of state law. . . . We believe, however, that this case is so different from the cases in which the insured's burden developed, that those cases provide no authority for this case.

This belated lip service to *Erie* principles did not alter the court's analysis and provides no reason for denial of review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.
AETNA CASUALTY AND SURETY COMPANY, APPELLANT

No. 81-1180

KEENE CORPORATION, APPELLANT

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.

No. 81-1181

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA
LIBERTY MUTUAL INSURANCE COMPANY, APPELLANT

No. 81-1182

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, APPELLANT
AETNA CASUALTY AND SURETY COMPANY, ET AL.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-01011)

Decided October 1, 1981
(Judgment entered this date)
Modified December 21, 1981

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Before: BAZELON, *Senior Circuit Judge*, WILKEY and WALD, *Circuit Judges*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Opinon filed by *Circuit Judge* WALD concurring in part.

BAZELON, *Senior Circuit Judge*: This case arises out of the growing volume of litigation centering upon manufacturers' liability for disease caused by asbestos products. In this action, Keene Corporation (Keene) seeks a declaratory judgment of the rights and obligations of the parties under the comprehensive general liability policies that the defendants issued to Keene or its predecessors [1] from

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[1] Keene Corporation was formed in 1967 and subsequently purchased most of the stock of Baldwin-Ehret-Hill, Inc. In 1968, Baldwin-Ehret-Hill became a subsidiary of Keene, and in 1970 it was merged into Keene Building Products Corporation, another

1961 to 1980. Specifically, Keene seeks a determination of the extent to which each policy covers its liability for asbestos-related diseases.[2]

Between the years 1948 and 1972, Keene manufactured thermal insulation products that contained asbestos. As a result, Keene has been named as a codefendant with several other companies in over 6000 lawsuits alleging injury caused by exposure to Keene's asbestos products. Those cases typically involve insulation installers or their survivors alleging personal injury, or wrongful death, as a result of inhaling asbestos fibers over the course of many years. The plaintiffs in the underlying suits allege that they contracted asbestosis, mesothelioma, and/or lung cancer as a result of such inhalation.[3]

Keene subsidiary. All corporations sold thermal insulation products that contained asbestos. Keene's brief at 5-6. All corporations will be referred to as "Keene" for simplicity.

[2]Under Borel v. Fibreboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), an asbestos manufacturer such as Keene can be held jointly and severally liable for asbestos-related diseases that were caused, in part, by its products.

[3] Asbestosis is a fibrous condition of the lungs, which is caused by asbestos fibers reaching the alveoli. Once begun, the condition progresses without additional inhalation of asbestos, but it becomes even more serious if inhalation continues. The seriousness of the disease in individual cases depends on the duration and intensity of inhalation and on individual idiosyncrosy. *See* Selikoff, Bader, Bader, Churg, and Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg, and Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. NEW YORK ACAD. SCI. 139 (1965). For a brief discussion of asbestosis, *see* Borel v. Fibreboard Paper Products Corp., *supra* note 2.

Mesothelioma is a malignant tumor of the lining of the lungs or the lining of the peritoneum, which surrounds the organs of the gastrointestinal tract. It is well-established that prolonged inhala-

From 1961 to the present, Insurance Company of North America (INA), Liberty Mutual Insurance Company (Liberty), Aetna Casualty and Surety Company (Aetna), and Hartford Accident and Indemnity Company (Hartford) issued comprehensive general liability (CGL) insurance policies to Keene. From December 31, 1961 through August 23, 1968, INA insured Keene; from August 23, 1967 through August 23, 1968, Liberty insured Keene;[4] from August 23, 1968 through August 23, 1971, Aetna insured Keene; from August 23, 1971 through October 1, 1974, Hartford insured Keene; and from October 1, 1974 through October 1, 1980, Liberty insured Keene.[5] The policies that these companies issued to Keene were identical in all relevant respects. The coverage language of the policy that Hart-

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tion of asbestos fibers causes mesothelioma. The disease can develop many years after inhalation ceases, and can manifest itself several months after it begins to develop.

Lung cancer, or bronchogenic carcinoma, is also generally thought to be caused by prolonged inhalation of asbestos. It too can develop and manifest itself long after inhalation ceases.

The details of the development of these diseases are not relevant to the issues decided below. The only relevant facts are that the diseases develop long after exposure to Keene's products, and that Keene can be held liable for their occurrence.

[4] From August 8, 1967 through August 23, 1968, both INA and Liberty insured Keene. Liberty argues that its 1967-68 policy does not cover Keene's liability for asbestos-related disease. That issue, which the district court decided against Liberty, is addressed in Part III below.

[5] J.A. at 1028-29. From November 1, 1948 through November 1, 1959, Pennsylvania Manufacturers' Association Insurance Co. insured Keene. Whether its policies covered products liability is in dispute in another case. *See* Keene Corp. v. Pennsylvania Manufacturers' Association Insurance Co., Civ. No. 78-1011 (D.D.C. Jan. 30, 1981), *remanded*, No. 81-1248 (D.C.Cir. Oct. 1, 1981).

ford issued to Keene from 1971 to 1974 is typical. It states that

> [t]he company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent. . . .

E.g., J.A. II at 627. "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person," *id.* at 663; and "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury* . . . neither expected nor intended from the standpoint of the *insured*. *Id.* at 664.[6]

Keene tendered the asbestos-related damage cases to its insurance companies for defense and indemnification. Each company, however, either denied all responsibility for the suits or accepted only partial responsibility. Memorandum op. at 2 (J.A. IX at 3532).

On June 6, 1978, Keene filed this suit for a declaratory judgment and damages in the United States District Court for the District of Columbia. Keene contended that any stage in the progression of an asbestos-related disease triggers coverage of Keene's entire liability under each of the policies. Aetna, INA, and Liberty argued that coverage is triggered only when bodily injury manifests itself

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[6] For a summary of the differences in coverage language amount of the policies, *see Appendix* A (reproduced from J.A. III at 1031-35). All of the policies are reproduced at J.A. I at 17-245, J.A. II at 537-832, J.A. III at 1036-1202, J.A. IV at 1203-1509). We hold that none of the differences in the policies' language warrants different interpretations in this case.

during a policy period. Hartford took an intermediate position, arguing that coverage is triggered by the inhalation of asbestos fibers, but that each company's coverage is determined by the ratio of exposure years during its policy period to the entire period of inhalation.

Keene and Hartford filed motions for partial summary judgment based on their respective theories of coverage, and Aetna filed a motion for summary judgment asserting that no case or controversy had been presented. On January 30, 1981, the district court granted Hartford's motion; it granted in part and denied in part Keene's motion; and it denied Aetna's motion. The district court held that indemnification and defense costs should be prorated among the insurance companies according to the relative extent of exposure during their respective policy periods. The district court also held that Keene is liable for a pro-rata share of the costs when exposure occurred during a period in which Keene was uninsured. J.A. IX at 3537-38.

Pursuant to 28 U.S.C. § 1292(b) (1976), the district court, *sua sponte,* certified its order for interlocutory appeal. INA, Liberty, Aetna, and Keene filed Petitions for Leave To Appeal, and on February 20, 1981, this court granted those petitions and ordered that the appeals be consolidated and expedited. We reverse the district court's order and remand the case to trial on the issues of damages and on the issue of the applicability of Liberty's 1967 policy.[7]

I. Justiciability

Aetna argues that Keene's declaratory judgment action does not present a case or controversy. Aetna asserts that Keene must raise insurance coverage issues in the context of a particular case in which an insurance company has refused to defend or indemnify Keene. We disagree.

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[7] *See* note 4 *supra.*

The standard for finding a justiciable "case or controversy" in a declaratory judgment action is no less demanding than the standard in any other type of action. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The dispute "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna, supra*, 300 U.S. at 241. This standard was illuminated by Justice Murphy in *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270 (1941), where he stated that "the question [of justiciability] in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (1973) § 2757.

This suit by Keene does not present a hypothetical set of facts. Keene has been, and will continue to be, sued for injuries that result from the use of its asbestos products. For each of these suits—past, present, and future—the rights and obligations of Keene and its insurers must be resolved. There can be no question that the interpretation of the contracts at issue in this case presents a "real and substantial controversy" that can be specifically resolved by a decision in this case.

Aetna implies that the rights and obligations created by the insurance policies cannot be determined without consideration of the facts of a particular tort suit. We have before us, however, the terms of the insurance policies and the facts of the particular types of diseases whose coverage is at issue. We are not aware or informed of any facts that would come to light in a particular tort suit that would be relevant to the determination of the policies'

applicability to Keene's liability for asbestos-related injury. We hold, therefore, that the case is justiciable.[8]

II. Coverage of the Insurance Policies

The language of each policy at issue in this case clearly provides that an "injury," and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal proximity to one another. In cases involving asbestos-related disease, however, inhalation—the "occurrence" that causes the injury—takes place substantially before the manifestation of the ultimate injury—asbestosis, mesothelioma, or lung cancer.[9] Furthermore, although it is not known how little exposure is required to cause disease, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.

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[8] Insurance coverage issues are commonly resolved in declaratory judgment actions. *See* Wright & Miller, *supra*, at 2760.

[9] The district court found that 15 or 20 years can pass following an initial inhalation before asbestosis manifests itself. Longer periods of time can pass before mesothelioma or lung cancer manifest themselves. Keene Corp. v. Insurance Co. of N. America, Civ. No. 78-1011 (D.D.C. Jan. 30, 1981) memorandum op. at 3 (J.A. IX at 3533) [hereinafter cited as memorandum op.] *Accord*, Selikoff, Churg, & Hammond, *supra* note 3.

Neither the case law [10] nor the terms of the policies lead us directly to a resolution of the coverage issues raised in this case. Unfortunately, the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases. We have sought, however, to interpret these contracts in a manner that is equitable and administratively feasible and that is consistent with insurance principles, insurance law, and the terms of the contracts themselves.

We conclude that each insurer on the risk between the initial exposure and the manifestation of disease is liable to Keene for indemnification and defense costs. If pos-

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[10] Jurisdiction in this case exists under 28 U.S.C. § 1332 (1976) by virtue of the diversity of citizenship between the plaintiffs and each of the defendants. We find it unnecessary, however, to reach the issue of the applicable state law. The district court did not address the issue, nor did any of the parties raise the issue. This omission is apparently due to the fact that the potentially applicable state laws do not differ from one another.

Keene is incorporated in Delaware, has its principal place of business in New York, and is licensed to do business in the District of Columbia. INA is incorporated in Pennsylvania and has its principal place of business in Pennsylvania. Aetna is incorporated in Connecticut and has its principal place of business in Pennsylvania. Hartford is also incorporated in Connecticut and has its principal place of business in Connecticut. And Liberty is incorporated in Massachusetts and has its principal place of business in Massachusetts. None of the laws of these states gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of laws. (There is what some have termed—somewhat confusingly—a "false conflict." *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS OF LAW 188 (3d ed. 1977); Comment, *False Conflicts*, 55 CALIF. L.REV. 74, 113 (1967).) Therefore, we need not engage in the exercise of identifying which jurisdiction's law governs. *See* Waters v. American Automobile Ins. Co., 363 F.2d 684, 687 (D.C.Cir. 1966); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 585 (D.C.Cir. 1965).

sible, the factual predicate for the allocation of costs among insurers should be based on the facts of the underlying tort suit. If, however, the tort doctrine governing the underlying suit does not require proof of facts that would form a sufficient basis upon which to allocate insurance liability, then the necessary facts may be determined independently of that suit.[11]

In construing the policies' coverage of liability for asbestos-related diseases, our objective must be to give effect to the policies' dominant purpose of indemnity. COUCH ON INSURANCE 2D §§ 15:22, 15:41 (2d ed. Anderson 1959); 4 WILLISTON ON CONTRACTS, § 900 (3d ed. Jaeger 1959). An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. By issuing the policy, the insurer agrees to assume the risk of the insured's liability in exchange for a fixed sum of money. At the heart of the transaction is the insured's purchase of certainty—a valuable commodity. *See* S. HUEBNER, K. BLACK, JR., R. CLINE, PROPERTY AND LIABILITY INSURANCE (2d ed. 1976) 5-7. This view of the insurance policies provides the starting point for analysis.

The next question must be "certainty with respect to what contingencies?" For an insured is only entitled to indemnity for losses that are covered by its policy. We are aided in our analysis of these policies' coverage by the well-accepted rule that ambiguity in an insurance contract must be construed in favor of the insured. *See, e.g., Blue Anchor Overall Co. v. Pennsylvania Lumbermen's Mut. Ins. Co.*, 385 Pa. 394, 123 A.2d 413 (1956); COUCH ON INSURANCE 2D, § 15:14 (2d ed. Anderson 1959); WILLISTON ON CONTRACTS, § 621 (3d ed. Jaeger 1959). We believe, how-

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[11] *See* TAN pp. 32-35 *infra*.

ever, that although particular terms of the policies are ambiguous as applied to asbestos-related diseases, the principles embodied in the insurance policies provide a sufficient basis upon which to decide this case. In discerning those principles, our guide is—as it must be—the reasonable expectations of Keene when it purchased the policies. *See, e.g., Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 869-70, 377 P.2d 284, 288-89, 27 Cal.Rptr. 172, 176-77 (1962); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305, 208 A.2d 638, 644 (1965); *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346 (1978); COUCH ON INSURANCE 2D, § 15:16 (2d ed. Anderson 1959).[12]

The analysis of the insurers' duty to indemnify Keene is divided into three logical steps: first, the trigger of coverage under the policies; second, the extent of coverage once a policy is triggered; and third, the allocation of liability among insurers if more than one policy is triggered. That analysis is followed by an examination of the insurers' duty to defend Keene and a discussion of the procedural mechanisms by which asbestos-injury suits can be adjudicated.

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[12] Professor (now Judge) Keeton has suggested that the legal doctrines governing the construction of insurance contracts fit together under a more general, frequently unstated, principle that can be summarized as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated these expectations.

Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970). Professor Keeton argues that the principle is appropriate in view of the fact that an insurance policy is a contract of adhesion. *Id.* As applied to this case, we agree with Judge Keeton and explicitly base our interpretation of these policies on the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language.

A. *Trigger of Coverage*

The first step in the analysis of this problem is to determine what events, from the point of exposure to the point of manifestation, trigger coverage under these policies. In the language of the policies, the question is when did "injury" occur? Both Keene and Hartford advance slightly different versions of the "exposure theory" of coverage. Keene argues that successive coverage is triggered by both exposure to asbestos dust ("inhalation exposure")[13] and the subsequent development of disease ("exposure in residence").[14] Keene bases its argument on medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter. Hartford also argues that successive coverage is triggered by continued exposure. Its argument is similarly based on the medical evidence of discrete tissue damage as each asbestos fiber reaches the lungs. For no apparent reason, however, Hartford asserts that the continued progression of disease following exposure does not trigger additional coverage.[15] Basing its decision on *Insurance Co. of N. America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1326 (Mar. 9, 1981), the district court adopted Hartford's version of the exposure theory.[16]

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[13] Keene's brief at 18.

[14] *Id.*

[15] Hartford also argues that the extent of an insurer's liability is limited by the proportion of exposure that occurred in its policy period, whereas Keene argues that, once an insurer's policy is triggered, the insurer is liable for the full loss. *See* pp. [22a-28a] *infra*. *See also* p. [20a] n.24.

[16] The Fifth Circuit also followed that case in Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981). In Insurance Co. of N. America v. Forty-Eight Insulations, 633 F.2d 1212 (6th

INA, Liberty, and Aetna advance the "manifestation" theory of coverage. They argue that coverage is triggered only by the manifestation of either asbestosis, mesothelioma or lung cancer. They assert that their interpretation of the contracts is supported by the ordinary meaning of the terms "bodily injury, sickness or disease." They claim that "bodily injury" does not occur until cellular damage advances to the point of becoming a recognizable disease. INA and Liberty rely on cases in other areas of the law—workmen's compensation, health insurance coverage, and statutes of limitation—that support their interpretation of the term "injury." *E.g., Travelers Insurance Co. v. Cordillo,* 225 F.2d 137 (2d Cir.), *cert. denied,* 350 U.S. 913 (1955) (workmen's compensation), *cited in* Liberty's brief at 42-44 and INA's brief at 28; *Reiser v. Metropolitan Life Insurance Co.,* 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd,* 289 N.Y. 561, 43 N.E.2d 534 (1942) (health insurance), *cited in* Liberty's brief at 45 and INA's brief at 26; *Urie v. Thompson,* 337 U.S. 163 (1949) (statute of limitations), *cited in* INA's brief at 27.

The policy language does not direct us unambiguously to either the "exposure" or "manifestation" interpreta-

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Cir. 1980), *aff'd on rehearing,* Nos. 78-1322-1326 (Mar. 9, 1981), the issue of allocating indemnification expenses was not before the court. The district court in that case held that both defense and indemnification costs should be apportioned among the insurers and the insured on a pro-rata basis. Insurance Co. of N. America v. Forty-Eight Insulations, 451 F.Supp. 1230 (E.D.Mich. 1978). The insured, however, only appealed the issue of apportioning defense costs to itself. The Sixth Circuit held that the defense costs should be apportioned on the same basis that the district court used to apportion indemnification costs. In *Porter,* it is unclear whether that court held that the insured must bear a pro-rata share of indemnification and defense costs.

For reasons discussed throughout this opinion, however, we decline to adopt the approach taken in those cases.

tion. In the context of asbestos-related disease, the terms "bodily injury," "sickness" and "disease," standing alone, simply lack the precision necessary to identify a point in the development of a disease at which coverage is triggered. The fact that a doctor would characterize cellular damage as a discrete injury does not necessarily imply that the damage is an "injury" for the purpose of construing the policies. At the same time, the fact that an ordinary person would characterize a fully developed disease as an "injury" does not necessarily imply that the manifestation of the disease is the point of "injury" for purposes of construing the policies. In interpreting a contract, a term's ordinary definition should be given weight, but the definition is only useful when viewed in the context of the contract as a whole.

Moreover, the legal definition of "injury" in other contexts informs the term's definition in this case only if the term operates in a functionally similar manner in the other contexts. In the areas of workmen's compensation, health insurance, and statutes of limitations, the concept of "injury" performs a function that is different from its function in the context of comprehensive general liability policies.[17] Therefore, the term's definition in those contexts

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[17] Workmen's compensation cases are only minimally instructive in construing comprehensive general liability policies. Those cases, only some of which adopt the manifestation approach, rely largely on the legislative intent behind workmen's compensation statutes. *See* General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 212 (2d Cir. 1977); Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The cases that adopt the manifestation approach are based on "the overriding importance of efficient administration" in the workmen's compensation system. *Cardillo, supra*, 225 F.2d at 145. Although administrative feasibility must be one of our concerns in this case, it is not so "overriding" that we would be willing

is only minimally relevant to the question at hand. Instead, the purpose of the insurance policies must inform our construction of the term "injury".

If exposure to asbestos were deemed to constitute a discrete injury and thereby trigger coverage, as Hartford and Keene suggest, the subsequent development of a disease would be characterized best as a consequense of the injury. Future stages of development would not constitute new

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to accept the consequences that it would imply for the contracts before us.

Statute of limitations cases are not at all relevant. The date that a disease is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. *E.g.*, United States v. Kubrick, 444 U.S. 111 (1979). If the date of a disease's origin were to begin statute of limitations periods, meritorious claims would be barred. As a matter of policy, courts have held that the purpose of the statutes of limitations—to protect defendants against stale claims—does not warrant barring such claims. *See, e.g., id.* at 117; Urie v. Thompson, 337 U.S. 163, 169-71 (1949). The considerations involved in those cases have no bearing on the considerations relevant to this case.

The health insurance cases are more relevant to this case. The only problem in those cases, however, is to determine when a disease begins in order to decide whether it began during a policy period. The cases hold that if a disease manifests itself during a policy period, then that policy covers the disease even if the origin of the disease can be traced back to a point in time prior to the policy period. *See, e.g.*, Wilkins v. Grays Harbor Community Hospital, 71 Wash.2d 178, 427 P.2d 716 (1967); Reiser v. Metropolitan Life Insurance Co., 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd*, 289 N.Y. 551, 43 N.E.2d 534 (1942). In those cases, the security that the policies provided would be undermined if a disease were *not* covered by the insurer on the risk at the time the disease manifests itself.

The court in *Forty-Eight, supra* note 16, expressed a similar opinion concerning the relevance of cases in these areas of the law. 633 F.2d at 1220-22.

injuries[18] and therefore would not trigger additional coverage.[19] Under that interpretation, a manufacturer who bought a comprehensive general liability policy would not bear the risk of liability for diseases that occurred due to exposure during a covered period. It would, however, bear the risk of liability for diseases that manifest themselves during the covered period, but that occur because of exposure at a time when the manufacturer held no insurance. As a result, the manufacturer's purchase of insurance would *not* constitute a purchase of certainty with respect to liability for asbestos-related diseases. The insured would remain uncertain as to future liability for injuries whose development began prior to the purchase of insurance. There is no indication that such a de facto exclusion of coverage from the policies was in the contemplation of any party to the contracts in this case. At the least, such an exclusion is inconsistent with Keene's reasonable expectations when it purchased the policies. The policies state that the insured is covered for "injury" during the policy period. In purchasing such coverage, Keene could have reasonably expected that it was covered for all future liability, except liability for injuries of which Keene could

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[18] This seems to be Hartford's theory. Hartford does not suggest that exposure in residence should trigger coverage.

[19] This would not be true of Keene's characterization of asbestos-related diseases as a series of discrete injuries beginning with inhalation exposure and continuing throughout the development of the disease. That characterization would imply the same conclusion that we reach, although perhaps not when Keene is held jointly and severally liable with other manufacturers. *See* note 20 *infra*. Such a characterization is, however, unnecessarily fact-bound. If a disease could be predicted to develop many years after inhalation of asbestos, yet no cellular changes were known to occur during that period, we would still hold that all policies are triggered from the point of exposure through the point of manifestation. In addition, by beginning with that characterization of the disease, Keene fails to develop the proper rationale for the result it seeks.

have been aware prior to its purchase of insurance. A latent injury, unknown and unknowable to Keene at the time it purchased insurance, must, at least, be covered by an insurer on the risk at the time it manifests itself. Any other result would violate very reasonable expectations of Keene. Therefore we hold that manifestation of disease is one trigger of coverage under the policies.[20]

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[20] The characterization of each exposure as a discrete injury must be rejected for yet another reason. In Borel v. Fibreboard Paper Prods., *supra* note 2, the court held that an asbestos-product manufacturer can be held jointly and severally liable for asbestos-related disease as long as its products had some causal relationship to the development of the disease. That means that a person who used Keene's products for one year, for instance, and then used other manufacturers' asbestos-containing products for several years, could recover damages from Keene for his total loss. If each exposure is considered a separate "injury," under the terms of the policies, one might be able to argue that each insurer is responsible only for the "injuries" that occurred during its policy periods, even though Keene, in effect, would be liable for "injuries" that occurred outside those policy periods, as a result of exposure to other manufacturers' products. It is unclear whether that is the holding in *Forty-Eight, supra note* 16, 633 F.2d at 1225, or whether that is Hartford's argument. It is clear, however, that such a result would be contrary to the terms of the insurance policies, which explicitly state that the insurer will pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury [during the policy period]." As long as there was either inhalation exposure or exposure in residence during a policy period, and as long as Keene must pay damages as a result, the insurer must indemnify Keene for whatever damages it must pay. That must be true even if Keene is obligated to pay for injury that may have occurred, in part, as a result of exposure to other manufacturers' products. To that extent, the terms of the policies incorporate evolving tort doctrines. The allocation of liability among Keene's insurers is addressed in section II-C, below.

Thus, rather than engaging in further heuristic constructs to avoid this inappropriate result, we have approached this problem

In *American Motorists Ins. Co. v. Squibb*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978), the court faced an issue similar to the one in this case, under an insurance policy that was similar in all relevant respects to the policies we have before us. That case involved a drug manufacturer's liability for cancer that was caused by the ingestion of DES by the victims' mothers during pregnancy many years earlier. Squibb argued that the insurance company on the risk at the time of the disease's manifestation was obligated to pay the damages. The insurance company responded by arguing that the injury occurred when the victims' mothers ingested the drug and not when the disease manifested itself. The court held that "bodily injury" occurred when the cancer manifested itself. The court stated that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period." *Id.* at 659. That court did not have to determine the liability of an insurer that was on the risk prior to the diseases' manifestation.

Thus, if the purpose of the policies is not to be undercut, the manifestation of disease must constitute an "injury". Any characterization of exposure as a *discrete* injury, therefore, must be rejected. This is the same result that courts have reached in determining when an injury or disease begins for purposes of health and accident insurance policies. In those cases, courts have held that a manifestation rule is necessary to protect the reasonable expectations of the insured. *E.g., Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921). In health and accident insurance policies, as in liability insurance policies, the purpose of the con-

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in a straightforward manner that avoids the problem from the outset. We treat the diseases at issue in this case as single injuries that occur over extended periods of time.

tracts would be defeated if the insured had to bear the risk of disease that is latent at the time a policy is purchased. *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?* 48 FORDHAM L. REV. 657, 671 (1980) (this rule is necessary to provide security policyholder seeks).

None of this implies, however, that insurance policies may not also be triggered prior to manifestation. In fact, we conclude that coverage is also triggered by both inhalation exposure and exposure in residence.

To demonstrate why the policies require that both exposure and manifestation trigger coverage, we begin by positing a rule in which manifestation is the *sole* trigger of coverage. If that interpretation were adopted, as INA, Liberty, and Aetna propose, Keene would not be covered for diseases manifesting themselves after 1976.[21] By that time, it was widely known that prolonged inhalation of asbestos has a high probability of causing disease.[22] From about then on, insurance companies ceased issuing policies that adequately cover asbestos-related disease. Yet we can still expect thousands of cases of those diseases to manifest themselves throughout the rest of the century. If we were to hold that only the manifestation of disease can trigger coverage, the insurance companies would have to bear only a fraction of Keene's total liability for asbestos-related diseases.

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[21] Beginning in 1976, Liberty began using large deductibles and administrative fees for handling asbestos-damage claims. Memorandum op. p.2 n.2, p.6 (J.A. IX at 3532, 3536).

[22] Although asbestosis has been known to man since the early 1900s, *see* note 25 *infra*, the general danger of prolonged exposure to asbestos fibers was not fully recognized until the late 1960s or early 1970s. *See* Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1215. Keene stopped using asbestos in its products at about that time. Memorandum op. p. 1 (J.A. IX at 3531).

The possibility of that result would undermine the function of the insurance policies. When Keene purchased the policies, it could have reasonably expected that it was free of the risk of becoming liable for injuries of which it could not have been aware prior to its purchase of insurance.[23] There is no doubt that these losses would be covered if the diseases at issue developed spontaneously upon inhalation. Inhalation of asbestos is an "occurrence" that causes injury for which Keene may be held liable. The possibility that the insurers may not be liable arises solely because there is a period of time between the point at which the injurious process began and the point at which injury manifests itself. In this case, during that interim period, the existence of latent injury among people who had worked with asbestos became predictable with a substantial degree of certainty. The injury and attendant liability became predictable precisely because it was discovered that past occurrences were likely to have set in motion injurious processes for which Keene could be held liable. To accept the argument that *only* manifestation triggers coverage—and allow insurers to terminate coverage prior to the manifestation of many cases of disease—would deprive Keene of the protection it purchased when it entered into the insurance contracts. We, therefore, reject the manifestation theory as presented by INA, Aetna, and Liberty,[24] because it does not allow exposure, as well as manifestation to trigger insurance coverage.

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[23] *See* p. [16a-17a] *supra.*

[24] The other circuits that have considered this manifestation theory in the context of asbestos-related disease have also rejected the theory. *See* Porter v. American Optical Corp., *supra* note 16; Insurance Co. of No. America v. Forty-Eight Insulations, Inc., *supra,* note 16. One district court, however, has adopted the manifestation theory. *See* Eagle-Picher Industries v. Liberty Mut. Ins. Co., Civil Action No. 78-2739-Z (D.Mass., August 14, 1981).

Thus, in order for Keene's rights under the policies to be secure, both inhalation exposure and exposure in residence must also trigger coverage. Regardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of an injurious process is enough for it to constitute "injury" under the policies.

This conclusion is consistent with the law involving insurance coverage of losses that begin during a period of coverage but continue to develop after a policy's expiration. For example, *Snapp v. State Farm Fire & Cas. Co.*, 206 Cal.App.2d 827, 24 Cal. Rptr. 44 (1962) involved a fire insurance policy that included coverage of most types of physical damage to property. The policy was issued on the plaintiff's house, which had been damaged due to movement of the land under the house. While the land was still unstable, the policy expired, and the insurer sought to limit its liability to the amount of damage that had occurred prior to the policy's termination date. The court held that the insurer's liability was not so limited, and that it had to indemnify the policyholder for all damage caused until the land movement ceased. The court stated that "[t]o permit the insurer to terminate its liability while the fortuitous peril which materialized during the term of the policy was still active would not be in accord either with applicable precedents or with the common understanding of the nature and purpose of insurance." *See also Harman v. American Cas. Co.*, 155 F. Supp. 612 (S.D. Cal. 1957) (insurer cannot terminate property loss or fire protection while land remains unstable).

These cases illustrate the principle that when it becomes known that an occurrence has set in motion a process that has a significant probability of resulting in a covered loss, the insurer on the risk at that time is liable for the full loss. It does not matter whether the insurer learns of a progressing loss through direct observation, as in *Snapp*, or through statistical inference, as in asbestos-injury cases.

It is the use of that knowledge to shift a covered risk back to the insured that is not permitted.[25]

In sum, the allocation of rights and obligations established by the insurance policies, would be undermined if either the exposure to asbestos or the manifestation of asbestos-related disease were the *sole* trigger of coverage. We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret "bodily injury" to mean any part of the single injurious process that asbestos-related diseases entail. We now proceed to consider the extent to which an insurer is liable to its policyholder once coverage under its policy is triggered.

B. *The Extent of Coverage*

The policies at issue in this case provide that the insurance company will pay on behalf of Keene "all sums" that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period. We have defined "bodily injury" to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of disease. As a result, when Keene is held liable for an asbestos-related disease, only part of the disease will have developed during any single policy period. The rest of the development may have occurred during another policy period or during a period in which Keene had no insurance. The issue that arises is whether an insurer is

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[25] Theoretically, it would be possible to preserve Keene's rights under the policies if coverage were triggered at the point at which the dangers of asbestos inhalation were discovered. Such an interpretation, however, is not compelled by the terms of the policies and would be impossible to implement.

Keene did not raise the exposure-in-residence aspect of its argument below. Because we do not rely, however, on any legal or factual aspect of Keene's argument, *see* note 19 *infra*, we are not precluded from deciding that exposure in residence triggers coverage.

liable in full, or in part, for Keene's liability once coverage is triggered. We conclude that the insurer is liable in full, subject to the "other insurance" provisions discussed in section C below.

Hartford argues that each insurer is required to pay only a pro-rata share of Keene's liability. Once an insurer's coverage is triggered, its share would be determined by the duration of a plaintiff's exposure to Keene's products during its policy periods in relation to the entire duration of the plaintiff's exposure to Keene's products. Under Hartford's scheme, if there is a period of exposure during which Keene is uninsured, then Keene would bear a pro-rata share of the liability.[26]

Hartford's argument is based on its characterization of asbestos-related diseases as consisting of a multitude of discrete injuries to the lung tissue. We have declined, however, to rely on that factual characterization in determining the trigger of insurance coverage,[27] and we decline to rely on it in determining the extent of coverage. Instead, we continue to rely on the terms of the contracts and the principles they embody.

Our starting point is the interpretation of the policies as the insurers' promises of certainty to Keene. The policies that were issued to Keene relieved Keene of the risk of

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[26] Apparently, the formula Hartford would propose is the following:

$$\text{Insurance company X's pro-rata share} = \frac{\text{number of years of exposure to Keene's products during company X's policy period}}{\text{Total number of years of exposure to Keene's products}} \times \text{Keene's total liability}$$

But see note 20 *supra*. Hartford argues that only inhalation exposure should be taken into account in prorating liability.

[27] *See* pp. [15a-17a] & n.20 *supra*.

liability for latent injury of which Keene could not be aware when it purchased insurance. Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred.[28] If, however, an insurer were obligated to pay only a pro-rata share of Keene's liability, as the district court held, those reasonable expectations would be violated. Keene's security would be contingent on the existence and validity of all the other applicable policies. Each policy, therefore, would fail to serve its function of relieving Keene of all risk of liability. The logical consequence of this is that the policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy's limits, but subject to "other insurance" clauses, discussed in section C. below.

Judge Wald suggests that the rationale of our decision is consistent with prorating insurance obligations to Keene for the years in which it was not insured. Judge Wald

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[28] *See* p. [16a-17a and 21a-22a] *supra*.

The possibility of injury as a result of prolonged exposure to a substance was not unknown at the time these policies were issued. Cases of asbestosis were reported among asbestos textile workers early in the twentieth century, and by the 1930s it was well recognized that prolonged exposure to asbestos causes the disease. *See* Borel v. Fibreboard Paper Products Corp., *supra* note 2. *See generally* Selikoff, Churg, and Hammond, *supra* note 3 (discussion of asbestosis). Moreover, most of the policies explicitly recognize continuous exposure to certain conditions as an occurence that can result in injury. They provide that such exposure within a single policy period is considered a single occurrence for purposes of the limit of liability provisions. Yet none of the policies provided that the insurer's liability would be limited in any way when exposure extends over several policy periods. The absence of such a provision supports our view that Keene could have reasonably expected *complete* security from each policy it purchased.

believes such a pro-rata allocation is fair, and we do not think her view is unreasonable. As we have just shown, however, such an allocation is inconsistent with the terms and underlying principles of the insurance policies at issue in this case.

We read Judge Wald's reasoning as follows: 1) As the court interprets the term, an asbestos-related "injury" occurs over a long period of time; 2) if Keene was uninsured during part of that time, then Keene is not covered for the full injury; 3) therefore, Keene should pay a pro-rata share of its own liability.

If we read Judge Wald correctly, her position is problematic. Although we have defined the term "injury," we have done so only as an incidental aspect of a logically prior determination of Keene's rights under the policies viewed in their entirety. The insurance policies provide Keene with the right to be free of all liability for asbestos-related disease, unless such a disease was known or knowable by Keene at the time it purchased an insurance policy.[29] For that right to be preserved, each policy that Keene purchased between an initial exposure and the ultimate manifestation of a disease must be triggered. In a sense, that means that "injury" occurred during each of

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[29] *See* pp. [16a-17a, 19a-20a] *supra.*

As Judge Wald points out, concurring op. at p. [42a], n.7, this interpretation of the policies provides the basis of our entire decision. She is correct in pointing out that it is an "indispensable initial premise of the liability theory [that we espouse]." *Id.* We rest our interpretation on the terms and principles of the insurance policies in issue. *See* pp. [16a-17a, 19a-20a] *supra.* Judge Wald's reliance on fairness in support of an alternative—but unstated—basic premise is appealing. *Id.* However, the contracts at issue in this case do not warrant such an independent appeal to fairness as a basis for deciding to allocate liability among all of the parties. At the same time, we see nothing unfair in holding that Keene is fully covered by each of the policies that it purchased.

the policy periods. It does not mean, however, that there was some "injury" that did *not* occur during a policy period. That conclusion and the implication that the insurers are not obligated to indemnify Keene in full contradicts the first and foremost aspect of our decision—our holding that each policy provides Keene with the right to be free of liability for asbestos-related disease.

As stated above, each policy has a built-in trigger of coverage. Once triggered, each policy covers Keene's liability. There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.

Hartford argues that this allocation of liability allows Keene to "enjoy the benefits of insurance coverage which it has never paid for." Hartford's brief at 31.[30] The contrary point, however, is more accurate: For an insurer to be only partially liable for an injury that occurred, in part, during its policy period would *deprive* Keene of insurance coverage for which it paid. With each policy, Keene paid for insurance against all liability for bodily injury. The policies do not distinguish between injury that is caused by occurrences that continue to transpire over a long period

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[30] The Sixth Circuit made the same point in Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1225.

of time and more common types of injury.[31] Nor do the policies provide that "injury" must occur *entirely* during the policy period for full indemnity to be provided.

In support of its argument for pro-rata apportionment of liability, Hartford asserts that the liability scheme we now adopt would leave an insured equally off with one year of insurance coverage as it would be with several years of coverage. Id. That assertion is inapposite for two reasons. First, as a matter of probability, the more years of coverage that an insured has purchased, the smaller will be the number of injuries for which it will be liable. An insured will not be covered for an injury if it has insurance neither when a plaintiff's disease was developing nor when the disease manifested itself.[32] Second, and perhaps more important, because we hold below that only one policy's limits of liability may apply to one injury,[33] an insured who has purchased several policies that cover an injury will only be able to collect under one of those policies, even though he paid for several. Therefore, it is the insurer—not the insured—who reaps the most benefit from the similarity of treatment between an insured with one year of coverage and an insured with several years of coverage.[34]

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[31] This omission is particularly significant in the policies that explicitly recognize the possibility that injury can be caused by prolonged exposure to certain conditions. *See* note 28 *supra*.

[32] We recognize, however, that there is not a linear relationship between the number of years of coverage and the number of injuries that can be expected to be covered.

[33] *See* p. [28a] *infra*.

[34] We are further supported in our conclusion by the fact that Keene could be held fully liable for an asbestos-related injury even if a plaintiff's exposure to Keene's products was minimal compared to his or her exposure to other manufacturer's products. *See Borel, supra* note 2. If Keene were held fully liable under such circumstances, there would be no question but that whatever insurer was on the risk at that time could be held fully liable to

Not surprisingly, the policies do not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies. Keene claims that it is entitled to full indemnity for each injury up to the sum of the limits provided by the applicable policies. We do not agree. The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to "stack" applicable policies' limits of liability. To the extent possible, we have tried to construe the policies in such a way that the insurers' contractual obligations for asbestos-related diseases are the same as their obligations for other injuries. Keene is entitled to nothing more. Therefore, we hold that only one policy's limits can apply to each injury. Keene may select the policy under which it is to be indemnified. *Cf. Forty-Eight, supra,* 633 F.2d at 1226 n.28.

C. *Allocation of Liability*

In any suit against Keene for an asbestos-related disease, it is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because Keene cannot collect more than it owes in damages, the issue of dividing insurance obligations arises. The only logical resolution of this issue is for Keene to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury. That is the only way that Keene can be assured the security that it purchased with each policy. Our holding each in-

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Keene. Given that, it does not require too great a leap of logic to hold fully liable any insurer whose policy covers a particular injury. We need not confront the issue of an insurer's obligation if an injury for which the insured can be held liable is not indivisible as the diseases at issue in this case are.

surer fully liable to Keene is also consistent with other courts' allocation of liability when more than one insurer covers an indivisible loss. *E.g., Groul Construction Co. v. Insurance Company of North America,* 11 Wash.App. 632, 524 P.2d 427 (1974) (continuous damage to property insurance policy).

This does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the "other insurance" provisions of each policy provide a scheme by which the insurers' liability is to be apportioned. For instance, INA's policy states:

> When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below.

J.A. II at 551. The contribution provision referred to contains formulae for "contribution by equal shares" and for "contribution by limits," depending upon the provisions of other applicable policies.[35] These provisions of the

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[35] *E.g.,*

(a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each insurer has paid its limit in full or the full amount of the loss is paid.

(b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, INA shall

policies must govern the allocation of liability among the insurers in any particular case of asbestos-related disease. However, the primary duty of the insurers whose coverage is triggered by exposure or manifestation is to ensure that Keene is indemnified in full.[36]

D. *Costs of Defending Suits Against Keene*

The policies provide that the insurer shall defend any suit against Keene for damages due to bodily injury, even if the suit is groundless, false or fraudulent. The insurers' duty to defend Keene and to pay Keene for its defense costs are more broad than their duty to indemnify Keene. As long as a complaint indicates that Keene may be liable for an injury, an insurer must defend Keene if the facts alleged in the complaint indicate that its policy covers the alleged injury. Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs.[37]

Of course, only the insurer that Keene selects will defend Keene. The duty of that insurer is simply to defend Keene, not to minimize its own liability. As we state below, the factual basis of the insurers' contract obligations may be developed independently of the factual basis of the tort

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not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

J.A. II at 551.

In addition, nothing we hold today bars insurers from collecting from one another under the doctrine of contribution.

[36] The procedure by which this duty can be enforced is discussed in section E, below.

[37] Nothing we now hold should be read to prevent an insurer from sharing the costs of defense with other insurers under the "other insurance" clauses or under the doctrine of contribution.

suit. If it is possible to resolve both the tort dispute and the insurance contract dispute together, without disrupting the tort victim's suit and without imposing undue inconvenience on the victim, a trial court may do so. Otherwise the two disputes should be resolved separately. This should eliminate the possibility that the insurer that represents Keene at trial will attempt to skew the factual record to the disadvantages of other insurers.[38]

E. *Resolution of Factual Issues*

In a typical suit for products liability, the same set of facts would prove both the manufacturer's tort liability and the insurer's contractual liability. That is not true of suits that arise out of an asbestos-related disease. The leading case concerning manufacturers' liability for asbestos damage claims is *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 896 (1974). The court in *Borel* held that each manufacturer who contributed in any way, and at any time, to a claimant's bodily injury is fully liable for all of the result-

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[38] The construction that we adopt today should lead to far less complex tort suits than the district court's construction would have provoked. If each insurer and Keene had to bear pro-rata shares of total damage awards, all of them would have to join the other defendants (and their insurers) in each tort suit. Each suit would thus become an unwieldy spectacle. Within the plaintiff's suit for damages, groups of defendants would pursue disputes with each other. That result, which is not required by the contracts, would impose unnecessarily high costs on all parties—particularly the victim, who should not have to bear any of the cost of a dispute among Keene's insurers or between Keene and its insurers. We expect that these suits will be litigated more efficiently under the liability scheme we set forth today.

It should also be noted that we are not requiring that the company that defends Keene must also be the company whose policy limits determine the extent to which Keene may be indemnified. *See* p. [28a] *supra*.

ing damages. If a victim was exposed to the products of more than one manufacturer, each manufacturer is jointly and severally liable to the victim. *See also Karjala v. Johns Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975). As a result, a plaintiff in a suit against Keene need not prove the full extent of his or her exposure to asbestos. Yet that set of facts is essential to determining which policies cover Keene's liability.

The doctrine of joint and several tort liability in this context is an accepted means of vindicating the rights of the tort victims. Nothing that we decide concerning the contractual liability of the insurers to Keene should impair the tort plaintiff's prosecution of his or her suit.[39]

Thus initially, the full insurance obligation to Keene must be divided among the insurers whose policies are triggered based on the facts brought out in the tort suit against Keene. The possibility of additional coverage can be determined consensually among insurers, or it can be adjudicated among insurers in a subsequent law suit. At that point the insurance obligations can be reallocated among all the insurers whose policies are found to cover a particular injury.[40] Any facts concerning the period of exposure or the point of manifestation that are proved in an underlying tort suit need not be legally dispositive of a dispute among insurers concerning allocation of their liability. Perhaps if the underlying tort suit would not be disputed and the plaintiff would not be put to undue inconvenience, the factual record needed to allocate insurance

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[39] This would also be true of other underlying tort doctrines such as enterprise liability, *e.g.*, Hall v. E.I. du Pont de Nemours, 345 F.Supp. 353 (E.D.N.Y. 1972), or market share liability, *e.g.*, Sindell v. Abbot Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). *See generally*, Comment, 57 N.D.L. Rev. 81 (1981).

[40] *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?'* 48 FORDHAM L.REV. 657, 691-92 (1980).

responsibility may be developed during the course of the underlying tort suit.[41]

If a victim sues more than one asbestos-product manufacturer, it may be impossible to prove which company's products were used at which time. If so, it will be impossible to prove that exposure to Keene's products—as opposed to those of another manufacturer—occurred during a particular time period. In such a case, there should be a presumption that throughout the victim's period of exposure to asbestos he or she was exposed to Keene's and the other manufacturers' products. The insurer defending Keene in the underlying tort suits may then try to show that Keene's products could not have been involved for certain years.[42] Similarly, if a suit arises to resolve the allocation of insurance liability, any insurance company can try to prove that there was no inhalation of Keene's asbestos during or before its policy period. If an insurance company does so, then that company will be free of liability.

III. Liberty's 1967-68 Policy

The district court included Liberty's 1967-68 policy among the policies that potentially cover Keene's liability

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[41] Preferably this would be done by affidavit or deposition.

[42] We recognize that the insured generally bears the burden of proving coverage. The injuries at issue in these cases, however, are unique and traditional procedural rules cannot be allowed to defeat Keene's or its insurers' substantive rights under the policies. Reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation. The Sixth Circuit, in Insurance Co. of N. America v. Forty-Eight Insulation, *supra* note 16, also set out this procedure for litigating multiple-defendant suits for asbestos-related disease. We recognize that burdens of proof are matters of state law. Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959). We believe, however, that this case is so different from cases in which the insured's burden of proof developed, that those cases provide no authority for this case.

for asbestos-related injury.[43] Liberty argues that the policy does not cover Keene's liability for injuries caused by the products of its former subsidiary Baldwin-Ehret-Hill. In opposition to Keene's motion for summary judgment, Liberty submitted affidavits to support its position. Liberty also argues that if the policies did cover Baldwin-Ehret-Hill, that facet of their coverage was conveyed to Gale Corporation when Keene sold Baldwin-Ehret-Hill to Gale.[44] Keene responds by arguing that Endorsement No. 1 of the policy provides for coverage of any subsidiary in which Keene owned more than a fifty-percent interest.[45] In February 1968, Keene acquired more than fifty percent of Baldwin-Ehret-Hill's stock. Therefore, Keene argues, Baldwin-Ehret-Hill was covered by Liberty's policy.

We hold that there was before the district court a genuine issue of material fact on this point. Therefore, the district court erred in including the issue in its summary judgment order.

Conclusion

In view of the above, we reverse the district court's order of summary judgment. The district court should enter a judgment and institute further proceedings consistent with this opinion.

So ordered.

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[43] Memorandum op. at 3 (J.A. IX at 3532).

[44] Liberty's brief at 63-65.

[45] Keene's reply brief at 27-28. Endorsement No. 1 reads as follows:

> [t]he term named insured includes in addition to the person or corporation named in Item 1 of the declarations any business entity . . . while the person or organization named in Item 1 of the declarations . . . owns, during the policy period, an interest in such entity of more than fifty-percent (50%).

J.A. III at 1047.

Appendix A: Variations in Policy Language *

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
INA	12/31/61-12/31/64 **	To pay on behalf of the insured . . . damages because of bodily injury . . . arising out of . . . all . . . operations [other than automobile] of the insured	[T]he company shall . . . defend any suit against the insured alleging such injury . . . even if such suit is groundless, false or fraudulent	The words "bodily injury" . . . mean bodily injury, sickness, disease	This policy applies only to occurrences or accidents which take place during the policy period
	1/1/65-1/1/68	Same	Same	Same	Same
	1/1/68-8/23/68	INA will pay on behalf of the Insured . . . damages because of personal injury . . . to which this insurance applies, caused by an occurrence	INA shall have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	[P]ersonal injury means . . . bodily injury, disability "[B]odily injury" means bodily injury, sickness or disease sustained by any person (Definition of "occurrence" applies only to property damage)	This insurance applies only to personal injury . . . which occurs during the policy period

* Source: J.A. III at 1081-85.

** All policy provisions are taken from the 1/1/65-1/1/68 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	8/23/67-8/23/68*	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" means an accident including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
Aetna	8/23/68-8/23/71	The company will pay on behalf of the insured . . . damages because of bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period

* All policy provisions are taken from the 10/1/74-10/1/75 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Hartford	8/23/71-8/23/72	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period
	8/23/72-8/23/73	Same	Same	Same	Same
	8/23/73-10/1/74	Same	Same	"[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	Same

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	10/1/74-10/1/75	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness, or disease . . . which occurs during the policy period "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
	10/1/75-10/1/76	Same	Same	Same	Same
	10/1/76-10/1/77	The company will pay on behalf of the insured . . . damages because of . . . personal injury* . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"Personal injury" means . . . bodily injury "[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" [as amended] means . . . exposure to conditions which results in "bodily injury" . . . neither expected nor intended from standpoint of the "insured"	Not relevant

* The term "personal injury" was substituted, by endorsement, for bodily injury

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	10/1/77-10/1/78	Same	Same	Same	Same
	10/1/78-10/1/79	Same	Same	Same	Same
	10/1/79-10/1/80	Same	Same	Same	Same

Wald, *Circuit Judge*, concurring in part:

This is a case of first impression and, irrespective of how it is resolved, requires a "leap of logic," maj. op. n. 34, from existing precedent, for it concerns diseases about which there is no medical certainty as to precisely how or when they "occur." We do know the prerequisite—exposure to asbestos fibers—and the symptoms that manifest themselves, generally too late for effective treatment. What happens in between is still something of a mystery; why does one exposed person fall victim to the diseases while another does not? This suit is one of several filed in different courts to ascertain the liability of insurers of manufacturing companies when those companies are sued by asbestosis, mesothelioma and lung cancer victims who have been exposed to the companies' products. Two circuits, the Fifth[1] and Sixth,[2] have determined that exposure alone should trigger the insurer's liability.[3] The Sixth Circuit has also determined that the judgment awarded to the victim should be allocated among insurance companies pro rata according to their share of the total risk period during which the manufacturer was insured. If the risk period includes years when the manufacturer

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[1] Porter v. American Optical Corp., No. 78-1953 (5th Cir. April 8, 1981) [hereinafter *Porter*].

[2] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1236 (Mar. 9, 1981).

[3] The United States District Court for the District of Massachusetts, however, determined that manifestation triggered coverage. Eagle Picher Industries, Inc. v. Liberty Mutual Insurance Company, et al., Civil Action No. 78-2739-2 (D. Mass. August 14, 1981).

was uninsured (or self-insured), the manufacturer must bear a proportional share of the judgment.[4]

The approach taken in the panel opinion here is different from the approaches of other courts in two significant respects. First, it defines the "injury" that triggers insurance coverage not merely as exposure to asbestos fibers or manifestation of the symptoms of asbestosis, mesothelioma or lung cancer, but also—at least in the case of asbestosis—as the process by which the victim's body resists, adapts, and tries to accommodate itself to a foreign matter—a process, which we understand from the medical testimony elicited at trial, is a major, if not primary, factor in the development of asbestosis. In short, the "injury" is taking place every year that the asbestos fiber remains *in situs* until tissue damage in the lungs is significant enough to be detected by X-rays or to produce symptomatic effects of asbestosis, mesothelioma or lung cancer. *See* maj. op. at n.3. I *agree* with this more comprehensive definition of "injury," encompassing the period from initial exposure to manifestation, because it comports with what we know and do not know about the etiology and progress of the diseases. This process-oriented definition not only provides a flexible formula for adjudicating the legal issues associated with asbestos-related diseases, but also sets a useful precedent for other product-exposure injuries, as of yet unknown in origin. Further, the more comprehensive definition will give much needed certainty to the insurance industry, currently rent asunder by advocates of exposure and manifestation, whose fluctuating positions often depend upon their economic interests in a particular case, and by differing judicial rulings which seem to depend at least partially upon the equities of each case.

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[4] The Fifth Circuit was not forced to resolve the question of whether the insured ought to be included within the pro rata distribution of liability. *Porter*, 641 F.2d at 1145.

Second, the majority opinion exempts asbestos manufacturers from all financial responsibility arising from a suit if the manufacturer had purchased insurance which covered any part of the injury period.[5] I am not able to agree with this aspect of the majority opinion, as it applies to the period *prior* to the time when such coverage could no longer be obtained.[6] I just do not understand why an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period. It seems to me logical and fair[7]—as it seemed to the

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[5] However, if liability exceeds the liability limit of the policy, then the majority would hold the manufacturer liable for the amount exceeding the limit.

[6] I agree, however, that the manufacturer may target one insurance company to defend the suit and that if judgment is awarded for the victim, the targeted insurance company must pay the victim to the extent of coverage and then seek contribution from other on-line insurers. I disagree only to the extent that self-insurers are excluded from contributing.

[7] The majority finds my position "problematic," but that is only because I have not made as long a "leap of logic" as it. Thus, I do not think that "Keene's rights [to be free of all liability] under the policies viewed in their entirety," are so much the product of a "logically prior determination," maj. op. at 26, as they are the indispensable initial premises of the liability theory espoused in the opinion. Since I can find no first premises in the terms of the policies and canons of interpreting insurance policies, I must seek my own first premises in notions of fairness rather than in principles of logic. I cannot agree that it is fair to exempt self-insurers under these circumstances. I recognize the problems of working out the terms of a "self-insurance policy," but we should expect difficulties when we forge new ground. Certainly the majority's position entails its own share of implementation problems.

Sixth Circuit and to the trial court here—to distribute the ultimate financial responsibility on a pro rata basis among the various insurance companies on line during the risk period, and to include Keene as a self-insurer for the years when it failed to take out any insurance. This position, advocated by the Hartford Accident and Indemnity Company, is not, as the panel opinion says, maj. op. at [23a], based upon a conceptualization of asbestos-related diseases as a multitude of discreet injuries to the victim. Rather, it is based upon the very notion of "injury" adopted by the panel. If asbestos-related diseases are understood as progressive or cumulative, then all those who voluntarily assumed risk during the period when the diseases progressed must share the responsibility for the judgment and this includes self-insurers. If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as secure as those prudent companies that continually purchased insurance.

Subject to this concern, I concur with the majority opinion.

APPENDIX B

KEENE CORPORATION, Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA et al., Defendants.

Civ. A. No. 78-1011.

United States District Court,
District of Columbia.

Jan. 30, 1981.

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MEMORANDUM OPINION

JUNE L. GREEN, District Judge.

Plaintiff, Keene Corporation (Keene), is a New York corporation licensed to do business in D.C. The defendants, Insurance Company of North America, Aetna Casualty and Surety Company, Hartford Accident & Indemnity Co., Liberty Mutual Insurance Company and Pennsylvania Manufacturers Association, (PMA) [1] are all insurance companies which wrote policies of insurance for general liability for Keene or its subsidiary-predecessors. Plaintiff seeks a declaratory judgment under the policies of the respective defendants.

From time to time, Keene or Keene Building Products Corporation (KBPC), a wholly owned subsidiary, acquired all of the right, title and interest in the following manufacturers of insulation containing asbestos: Ehret Magnesia Manufacturing Co. (Ehret), Baldwin-Hill (B-H) and Baldwin-Ehret-Hill (BEH).

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[1] Neither Keene, its predecessor companies, nor PMA has located any policies of insurance, only index cards of policy numbers. The Court has dismissed PMA in a separate opinion filed this date.

In 1976, Keene closed out all of its thermal insulation products containing asbestos and has neither made nor sold them since that time.

Recently, more than 5,000 cases have been filed against Keene or its predecessors, alleging personal injury or wrongful death as a result of the use of its products which contained asbestos insulating material. The injuries claimed are asbestosis, mesothelioma and bronchogenic carcinoma.

Keene has called upon the defendant insurance companies to defend the suits and indemnify Keene under the general liability policies whether the action is against Keene, Ehret, B-H, BEH or KBPC. The defendants have failed to do so at considerable cost to Keene for defense and/or settlement of claims.

The insurance companies provided coverage as follows: INA insured BEH from December 31, 1961 through August 23, 1968; Hartford insured Keene and predecessors from August 23, 1971 through October 1, 1974; Liberty insured Keene from August 23, 1967 through August 23, 1968, and again from October 1, 1974 through September 30, 1980, and Aetna insured Keene from August 23, 1968 through October 1, 1971.[2] All of these policies contained products coverage.

Plaintiff has filed a motion for partial summary judgment, leaving for later, the question of damages.

Aetna has alleged that this Court has no jurisdiction to consider the matter. It claims that no case or controversy exists because the 5,000 plus cases have not been impleaded.

A declaratory judgment is an appropriate means for resolving controversies relating to the extent of coverage

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[2] Pursuant to the policies in effect on and after October 1, 1976, Liberty has agreed to defend and indemnify Keene on a deductible basis in which Keene bears most of the cost.

under a policy of insurance. *Ins. Co. of No. Am. v. Forty-Eight Insulations,* 451 F.Supp. 1230 (1978), *aff'd* 633 F.2d 1212 (6th Cir., 1980); *Friedstad v. Travelers Ind. Co.,* 452 Pa. 417, 306 A.2d 295 (1973); *Crown Cork & Seal, Inc. v. Aetna Casualty & Surety Co., et al.,* Pa.Ct. of Common Pleas (Oct. 9 1980). Moreover, the determination of the respective rights and duties of the various companies is a proper subject for summary judgment.

This Court makes no determination as to the liability or other pertinent matter on the individuals' suits against Keene and its former affiliates. Nothing contained herein shall prevent the insurance company or companies involved from raising all pertinent defenses. However, it is a case of controversy when a company which has bought coverage cannot get representation in lawsuits filed against it or indemnification because of arguments between the insurance companies themselves and the insured. The result is that the insured is without the representation it has paid for. Accordingly, Aetna's motion for summary judgment, which the Court more properly treats as a motion to dismiss, is denied.

Liberty, INA and Aetna maintain that *manifestation* of the bodily injury during the policy period triggers the coverage. Keene and Hartford, on the other hand, maintain that *exposure* to asbestos is the controlling policy period for a person who develops one of the asbestos caused ailments. The insurance policies provide coverage for bodily injury caused by an occurrence during the policy period. The Court must therefore decide when the bodily injury occurs in asbestos caused ailments.

This Court has heard testimony from two medical experts on asbestos related diseases, both of whom agree that the diseases asbestosis, mesothelioma and bronchogenic carcinoma have origins in concentrated inhalation of asbestos fibers, and that these diseases are cumulative and

progressive. The physical symptoms caused by these three diseases do not manifest themselves to an injured individual until years after the initial inhalation of asbestos. With asbestosis, sometimes 15 or 20 years will pass before an individual develops shortness of breath and a cough. The waiting period is even longer with those who develop brochogenic carcinoma due to asbestos inhalation. However, it is clear that bodily injury has occurred long before these symptoms develop.

The Court will first address the etiology of asbestosis as the overwhelming majority of underlying suits allege injuries due to asbestosis. Dr. Kleinerman attempted to equate the occurrence of the injury or disease in asbestosis with the advanced development of fibrosis, which he said generally occurs years after exposure.[3] However, he also stated that "any amount of fibrosis constituted injury" which indicates that the initial bodily insult occurs much earlier.

Dr. Gaensler indicated that tissue injury in an individual who develops asbestosis begins "virtually the moment that asbestos fibers [reach] the alveoli", and that a tissue injury could be ascertained by biopsy within 24 to 48 hours after the concentrated inhalation of asbestos. Further, he testified that scarring and the deposition of collagen could occur within weeks of inhalation. As a practical matter, this bodily injury could only be ascertained in its early

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[3] Asbestos fibers irritate the extremely delicate lung tissue when inhaled. They land in the alveoli where it is suspected they cause mechanical damage due to their stiffness. Additionally, in an effort to cleanse the lung, macrophages attempt to engulf the fibers. The fibers are too long frequently to be engulfed and the macrophages die, releasing proteolytic enzymes which further damage the lung. The end result of this tissue injury and reaction to the asbestos fibers is the formation of collagen and scar tissue, which is termed fibrosis.

stages where the patient had died in an accident and an autopsy was performed.

The Court finds that the original bodily injury and insult to the lungs in asbestosis cases occurs at or near the first heavy inhalation of the fibers and continues progressively. Bodily injury is injury to the tissue, not just diagnosable disease. It does not matter that this bodily injury is not diagnosable because of the limitations of medical equipment at the time of the original insult.

While this matter has been pending before this Court, a similar question has been before Chief Judge Feikens of the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit which affrmed his decision. *INA v. Forty-Eight Insulations, supra.*

We adopt the reasoning of Circuit Judge Keith who wrote for the majority:

> . . . the proponents of the manifestation theory urge that we treat asbestosis the same as any other disease and that we not make any "special rules" for the cumulative disease situation which asbestosis presents.
>
> We cannot agree. Cumulative disease cases are different from the ordinary accident or disease situation. First, the underlying theory of tort liability is that the asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies before us are comprehensive general liability policies which are designed to insure the manufacturer against products liability suits. The contracting parties expect coverage to parallel the theory of liability. Otherwise . . . the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any in-

surance coverage in later years when the disease manifests itself.

Second, a question might exist as to whether the microscopic tissue injury which occurs upon initial inhalation of asbestos should be defined as the occurrence of a "disease" or "bodily injury". However, there is universal medical agreement that the time asbestosis manifests itself is not the time when the disease occurred. No doctor would say that asbestosis occurred when it was discovered.

Id., 633 F.2d at 1219.

The cases relied upon by the proponents of manifestation are inapposite because they are primarily statute of limitations cases, workers' compensation cases and health insurance cases. *See Tijsseling v. Gen. Acc. Fire & Life Assurance Corp., Ltd.*, 55 Cal.App.3d 623, 127 Cal.Rptr. 681; *Met. Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955) *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955) ("Last employer" or "last exposure" rule). These distinctions have been dealt with in detail by Judge Keith, *INA v. Forty-Eight Insulations, supra*, 633 F.2d at 1220-1222.

Further support for the exposure theory comes from *Tenneco Chemicals v. Employers Mutual Liability Ins. Co.*, 76 Civ. 809 (S.D.N.Y.) (April 8, 1977). In *Tenneco*, plaintiff was injected with a radioactive drug for testing purposes. The drug broke down improperly and plaintiff suffered from radiation exposure for a long period of time. The insurance company covered the drug company starting two years after the injection and the policy expired eleven years before diagnosis. The court held against the insurance company, holding that occurrence coverage was possibly the broadest coverage and that the injury had occurred during the period of insurance coverage. Chief Judge

Feikens relied upon this case as does this Court. *INA v. Forty-Eight Insulations, supra,* 451 F.Supp. at 1242.

It should be noted particularly that if the manifestation theory were adopted, manufacturing companies would be unable to buy full products insurance protection. No insurer would undertake to protect completely a company which had exposed uncounted workers to a hazard for a period of years. This refusal would be likely in the instant case because of the probability of thousands of asbestos related injuries or diseases manifesting themselves at some future time.

The unreality of the manifestation theory becomes even clearer when it is realized that in such a situation those companies which were paid premiums to cover the risk at the time of manufacture and exposure would be free and clear from fiscal responsibility. In this connection, it should be pointed out that the partial insurance available to Keene at the present time calls for large deductible sums at exorbitant premiums.

The Michigan Court limited its opinion to asbestosis, but this Court finds that the exposure to and heavy inhalation of asbestos triggers the insurance coverage for the diseases mesothelioma and bronchogenic carcinoma as well. The link between asbestos and mesothelioma is well-established. Mesothelioma is a cancer of the mesothelial cells which line the chest walls and surround the organs of the chest cavity. It generally occurs 20 years or more after there has been excessive inhalation of asbestos fibers in those individuals who develop it. While it is easily discovered and diagnosed shortly after it develops, there is no satisfactory treatment of the disease and the victim almost always dies within several years of the tumor's initial development. Dr. Gaensler testified that the initial injury leading to the disease occurs when an asbestos fiber travels down the lung's airways, reaches an alveolus on the edge of the lung, perforates the lung, and, with breathing, irri-

tates the tissue. This process can occur within several days, but it may take as long as one to two months.

Bronchogenic carcinoma, a group of tumors that arise from different parts of the lung, is also linked with asbestos inhalation, though it has other known causes. Dr. Gaensler stated that significant asbestos exposure increases a smoker's chances of developing bronchogenic carcinoma five to tenfold.[4] He further testified that the irritation caused by the asbestos fibers, which is a factor in the eventually diagnosed bronchogenic carcinoma, begins immediately on inhalation of asbestos.

An obligation to defend Keene exists on the part of each insurance company which carried products liability coverage during the period of time in which the claimant alleges he/she was exposed to Keene's or its subsidiary predecessors' asbestos products. Keene asserts that it should not be required to contribute to its defense even if the exposure claimed fell at a time when Keene was uninsured. Keene argues that if it were covered at any time, it should be afforded representation. The Court cannot agree with that argument and finds that Keene stands in the same position as the insurance companies. If the years in question were covered by insurance, then obviously Keene should be both represented and indemnified, but if not, it should pay its pro rata share of both. *INA v. Forty-Eight Insulations, supra,* 633 F.2d at 1224-1225.

For the foregoing reasons, the Court holds that:

Insurance coverage is triggered when an injured claimant is exposed to asbestos products. Each insurance company on the risk during the times of claimant's exposure

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[4] Dr. Gaensler explained that the correlation between asbestos inhalation and bronchogenic carcinoma in non-smokers is not known because of its rare occurrence which makes carrying forth statistically significant studies extremely difficult.

shall bear its pro rata share of the cost of representation and indemnification for each such claim. The limit of liability for each company shall be based on its maximum limit per occurrence for each such policy. The terms "insurance company" or "each company" shall be equally applicable to Keene if self-insured or uninsured during any of the time in question.

APPENDIX C

81-1182

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA,
Appellant
AETNA CASUALTY AND SURETY COMPANY, ET AL.

Appeals From the United States District Court
for the District of Columbia

Before: BAZELON, Senior Circuit Judge; WILKEY and WALD, Circuit Judges.

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from herein is hereby reversed, and the cases are remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A Fisher
GEORGE A. FISHER
Clerk

Date: October 1, 1981

Opinion for the Court filed by Senior Circuit Judge Bazelon.

Opinion filed by Circuit Judge Wald concurring in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And Consolidated Case Nos.
81-1180, 81-1181 and 81-1182

Filed November 19, 1981

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

Order

The suggestions for rehearing *en banc* of Liberty Mutual Insurance Company, Hartford and Indemnity Company and Aetna Casualty Company have been circulated to the full Court. A majority of the Court has not yet voted in favor thereof: On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981
Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And Consolidated Case Nos.
81-1180, 81-1181, 81-1182

Filed November 19, 1981

Before: Bazelon, Senior Circuit Judge, Wilkey and Wald, Circuit Judges

Order

On consideration of the petitions for rehearing filed by Commercial Union Insurance Companies, Keene Corporation, Liberty Mutual Insurance Company, Aetna Casualty Company, Hartford Accident and Indemnity Company and Insurance Company of North America, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk